IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

SP Nos.4 & 5/Bang/2023 & IT(**TP**)A Nos. 238/Bang/2021 & 262/Bang/2022
Assessment years : 2016-17 & 2017-18

AMD India Private Limited, BMTC Building, 80 Feet Road, 6th Block, Near KHB Games Village, Koramangala, Bangalore – 560 095. **PAN: AABCC 3447R**	Vs.	The Assistant Commissioner of Income Tax, Circle 1(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Padamchand Khincha, CA
Respondent by	:	Shri Sunil Kumar Singh, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	03.04.2023
Date of Pronouncement	:	26.06.2023

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

These appeals by the assessee are against the orders of the Assessing Officer passed u/s. 143(3) r.w.s. 144C(13) r.w.s. 143(3A) & 143(3B) of the Income-tax Act, 1961 [the Act] dated 13.4.2021 for the Y 2016-17 and u/s. 143(3) r.w.s. 144C(13) r.w.s. 144B of the Act dated 28.02.2022 for the AY 2017-18. These appeals & Stay petition

were heard together and disposed of by this consolidated order for the sake of convenience.

2. The assessee is engaged in the business of providing software development services and marketing support services to its Associated Enterprises (AE). The services are provided on cost plus basis. A reference was made to the TPO for determining ALP of international transactions entered into by the assessee.

IT(TP)A No.238/Bang/2021

3. The assessee has raised the following grounds of appeal:-

"**GENERAL GROUND**

1. The Orders passed by learned Additional / Joint / Deputy / Assistant Commissioner of Income Tax / Income-tax Officer, National e-Assessment Centre (hereinafter referred as "AO" for brevity), learned Deputy Commissioner of Income Tax (Transfer Pricing) – 1(1)(1), Bangalore ("TPO") and the Honourable DRP-1, Bengaluru ("DRP") ("AO", "TPO" and DRP collectively referred as "lower authorities" for brevity) are bad in law and liable to be quashed.

GROUNDS RELATING TO TRANSFER PRICING – LEGAL ISSUES

2. The learned AO has erred in making a reference for the determination of the Arm's Length Price of the international transactions to the learned TPO without demonstrating as to why it was necessary and expedient to do so.

3. The lower authorities have erred in not appreciating that, the addition made to the income returned is bad in law as the charging or computation provision relating to income under the head "Profits & Gains of Business or Profession" do not refer to or include the amounts computed under Chapter X.

4. The lower authorities have erred in passing the Order without demonstrating that the Appellant had any motive of tax evasion.

GROUNDS RELATING TO TP (SOFTWARE DEVELOPMENT SEGMENT)

5. The lower authorities have erred in making transfer pricing adjustment of Rs. 52,67,17,689/- towards international transactions in the Software Development Segment.

6. The lower authorities have erred in:

(i) Rejecting comparables selected and the TP analysis undertaken by the Appellant on unjustifiable grounds. The lower income tax authorities have erred in rejecting following companies selected by the Appellant as comparables:
   - Akshay Software Technologies Limited
   - Evoke Technologies Private Limited

(ii) Rejecting following additional comparables proposed by the Appellant on unjustifiable grounds:
   - Sagarsoft India Limited
   - Sasken Communication Technologies Limited

7. The lower authorities have erred in:

(i) Conducting a fresh TP analysis despite absence of any defects in the transfer pricing analysis submitted by the Appellant.

(ii) Adopting a flawed process in issuing notices u/s 133(6) and relying on the information collected without providing the Appellant the complete information or providing an opportunity to cross examine;

(iii) Adopting inappropriate filters like one sided turnover filter, persistent loss making filter, 15% RPT filter etc. in the process of selecting comparables.

(iv) No adopting appropriate filters like onsite revenue filter, etc.

(v) Selecting inappropriate comparables and selecting companies as comparables even though they are not comparable in terms of functions performed, assets utilized, risks assumed, size, have unusual business circumstances, high margin, etc. The lower income tax authorities have erred in adopting the following companies as comparables:
   - Larsen & Toubro Infotech Ltd
   - Nihilent Ltd

- Inteq Software Pvt. Ltd
- Persistent Systems Ltd.
- Infobeans Technologies Ltd
- Thirdware Solution Ltd
- Infosys Ltd
- Aspire Systems (India) Pvt. Ltd
- Cybage Software Pvt. Ltd

8. The lower authorities have erred in incorrectly computing the operating profit margin of following comparables:

    - Aspire Systems (India) Pvt. Ltd

9. The lower authorities have erred in treating provision for doubtful debt as non-operating in nature while computing operating margins of comparables.

10. The learned AO/TPO have erred in considering Fixed Assets written off as operating in nature despite directions of Honourable DRP.

11. The lower authorities have erred in:

(i) Not adopting Cash PLI for computation of arm's length price;
(ii) Not recognizing that the Appellant was insulated from risks, as against comparables, which assume these risks and therefore have to be credited with a risk premium on this account; and
(iii) Not providing R&D adjustment and marketing adjustment while computing the Arm's length price.

<u>GROUNDS RELATING TO TP (SALES AND MARKETING SUPPORT SERVICES SEGMENT)</u>

12. The learned AO has erred in making transfer pricing adjustment of Rs. 2,53,32,409/- towards Marketing Support Segment.

13. The lower authorities have erred in:

(i) Rejecting comparables selected and the TP analysis undertaken by the Appellant on unjustifiable grounds. The lower income tax authorities have erred in rejecting following companies selected by the Appellant as comparables:

- Spectrum Business Solutions Ltd
- ICRA Management (India) Private Limited
- Hindustan Fields Services Pvt Ltd

(ii) Conducting a fresh TP analysis despite absence of any defects in the transfer pricing analysis submitted by the Appellant.

14. The lower authorities have erred in:

(i) Adopting a flawed process in issuing notices u/s 133(6) and relying on the information collected without providing the Appellant the complete information or providing an opportunity to cross examine;
(ii) Adopting inappropriate filters like one sided turnover filter, persistent loss making, 15% RPT filter etc. in the process of selecting comparables.
(iii) Selecting inappropriate comparables and selecting companies as comparables even though they are not comparable in terms of functions performed, assets utilized, risks assumed, size, have unusual business circumstances, high margin, etc. The lower income tax authorities have erred in adopting the following companies as comparables:
    - Ugam Solutions Private Limited
    - Majestic Research Services & Solutions Limited
    - Scarecrow Communications Limited

15. The lower authorities have erred in incorrectly computing the operating profit margins of the following comparables:

    - Quadrant Communications Ltd
    - Pressman Advertising Ltd
    - Ugam Solutions Private Limited
    - Killick Agencies & Mktg. Ltd

16. The learned AO/TPO have erred in considering Fixed Assets written off as operating in nature despite directions of Honourable DRP.

17. The lower authorities have erred in:

(i) Not adopting Cash PLI for computation of PLI;

(ii) Not recognizing that the Appellant was insulated from risks, as against comparables, which assume these risks and therefore have to be credited with a risk premium on this account; and

GROUNDS RELATING TO NOTIONAL INTEREST ON TRADE RECEIVABLES

18. The lower authorities have erred in:

(i) Ignoring the business, commercial and industry realities and economic circumstances applicable to the Appellant;
(ii) Making adjustment for notional interest on extended payment terms given to AE without appreciating that there is no real income arising to the Appellant;
(iii) Not appreciating that the receivable from the AE is not an international transaction within the meaning of section 92B of the Act;
(iv) Not appreciating that the receivable from AE is not a separate transaction from the sale of goods or provision of services from which it is arising;
(v) Not appreciating that the Appellant had adopted TNMM at segmental level, in which process, the receivables were considered as closely linked transaction and hence were subsumed and accordingly already considered;
(vi) Without prejudice, adopting SBI retail term deposit rate at 5.50%. The rate determined is excessive; and
(vii) Without prejudice, not adopting only LIBOR as the basis for benchmarking.

GROUND RELATING TO CORPORATE TAX

19. The lower authorities have erred in

(i) Making addition of Rs. 35,00,40,324/- by disallowing the depreciation claimed on Goodwill;
(ii) Not appreciating that the difference between Purchase consideration and the value of net assets acquired constitute an intangible asset;
(iii) Not appreciating that Goodwill is a business asset and falls within the meaning of "other business or commercial right of similar nature" Explanation 3(b) to section 32 of the Act and is eligible for depreciation; and
(iv) Not following the binding judicial precedents of Hon'ble Supreme Court.

OTHER GROUND

20. The learned AO has erred in not providing the credit of Advance Tax paid of Rs. 9,56,00,000 relating to the transferor company (which merged with the Appellant), while computing the tax liability of the Appellant.

21. The lower authorities have erred in levying interest under section 234B of the Act amounting to Rs. 18,99,44,423/-. On the facts and in the circumstances of the case, interest under section 234B is not leviable, being consequential in nature. The Appellant denies its liability to pay interest under section 234B.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly."

4. For the AY 2016-17, The TPO vide order dated 29.10.2019 u/s 92CA of the Act proposed the following TP adjustments**:-**

Name of the Segment	Average margin	TP Adjustment
Software development segment	20 comparables with median of 28.20%.	Rs. 55,87,73,405/-
Marketing support services segment	5 comparables with mean of 15.88%	Rs. 3,32,14,009/-
Notional Interest on Trade Receivables	Interest rate at 4.98% PA	Rs. 2,53,25,332/-
Total		**Rs. 61,73,12,746/-**

5. The AO passed a draft assessment order under section 143(3) r.w.s. 144C of the Act on 30.12.2019 incorporating the TP adjustment of Rs. 61,73,12,746. The AO also made addition of Rs.35,00,40,324 by disallowing the depreciation claimed on Goodwill arising out of merger. Aggrieved, the assessee filed its objections before DRP. Pursuant to the directions of the DRP, an order giving effect to DRP directions was passed by the TPO dated 08.04.2021 making total TP adjustment of Rs.56,44,19,964 as follows:-

Name of the Segment	Average margin	TP Adjustment
Software development segment	14 comparables with median of 27.28%	Rs. 52,67,17,689/-
Marketing support services segment	9 comparables with median of 12.99%	Rs. 2,11,54,051/-
Notional Interest on Trade Receivables	Interest rate at 5.50% PA	Rs. 1,65,48,223/-

6. Subsequently the AO passed the final assessment order dated 17.02.2021 incorporated the TP adjustment as per TP OGE to DRP directions and corporate tax addition of Rs.35,00,40,324/-. Disallowance of Goodwill as made in draft assessment order was retained in the final assessment order. Aggrieved by the final assessment order, the assessee is in appeal before the Tribunal.

7. Ground Nos. 1 to 4 were not argued by the ld. AR of the assessee and hence it is dismissed as not pressed. Ground No.5 is general in nature.

SOFTWARE DEVELOPMENT SEGMENT

8. The effective issue in ground No.6(i) & (ii) is with regard to rejection of Akshay Software Technologies, Evoke Technologies Ltd. & additional comparables selected by the appellant viz., Sagarsoft India Ltd. and Sasken Communication Technologies Ltd. by the revenue authorities, which the assessee has sought for inclusion of the same in the comparables list.

Ground No.6(i) - Akshay Software Technologies Limited [Akshay Software]

8.1 The revenue authorities held that Akshay Software Technologies Limited is functionally different on the ground that it is engaged in providing professional services, procurement, installation, implementation, support and maintenance of ERP products and services in India and Overseas. Further, the company has substantial onsite operations as it in incurred foreign expenditure of about 77%. The DRP upheld the rejection on the ground that this company is not part of search matrix of TPO.

8.2 Before us, the ld. AR submitted that this company is functionally similar to assessee as it provides Software Development Services and invited reference to Pg 1241 & 1244 of PB I and Pg 1002 of PB I. It was submitted that the TPO applied inconsistent approach for onsite filter. It was submitted that the company passes all filters applied by the TPO. Reliance is placed on the decision in the case of *Capco Technologies Private Ltd v DCIT IT(TP)A No 204/Bang/2021* (Para 26).

8.3 After hearing both the parties, we find from the case law relied by the ld. AR in *Capco Technologies Private Ltd v DCIT, IT(TP)A No 204/Bang/2021 dated 18.11.2021, the Tribunal has* at para 26 of the order remanded this issue to the TPO/AO for fresh consideration by observing as under:-

> "26. The inclusion of the remaining 2 companies needs to be considered now. As far as Akshay Software Technologies Ltd., is concerned, it has been the submission of the learned Counsel for the assessee that in assessee's own case for Assessment Year 2013-14 in IT(TP)A No.1981/Bang/2017 dated 21.03.2018, this Tribunal remanded the question of comparability of this company to the TPO for fresh consideration with some observations in para 19 of this order. Even in respect of the comparable company Evoke Technologies Ltd., in the very same order in para 22, the issue was remanded to the TPO for fresh consideration. We are of the view that in line with the decision of the Tribunal referred to above, the issue should be remanded to the TPO/AO for fresh consideration, after affording assessee opportunity of being heard. We hold and direct accordingly."

8.4 However, in the above decision, the case has been remitted and in the case of SAS Research & Development India P. Ltd. [223] 146 tamann.com 202 (Pune Trib) [ITA No.255(Pune) of 2021] for AY 2016-17 order dated 01.11.2022, the Tribunal examined the financial statements as well as the functional profile and activities of Akshay Software Technologies Ltd. in which it has been held as under:-

> **"7.** The TPO has excluded this comparable because as per TPO the comparable Akshay is providing professional services in the nature of Staffing Services by which the company employees IT Professionals and provides them to various clients in the IT Industry on contract staffing/permanent staffing basis.

7.1 The DRP has upheld the exclusion of Akshay Software on the ground mentioned by TPO. The DRP also held that Akshay is providing staffing services *i.e.* it is providing technical personnel to various clients.

7.2 The Ld.AR mainly stated that the company is engaged in rendering software development services and the same is evident from Note 18 'Revenue from operations' as it derives revenue from services.

7.3 We have heard both the parties and perused the records. In the Annual report of Akshay it is mentioned as under :

"Akshay Software Technologies Limited ('the Company') is engaged in providing professional services and procurement, implementation and support of ERP products and services in India and Dubai"

7.4 On the Web Site of Akshay it is mentioned as under :

"We have over three decades of presence in the UAE market of sourcing contract staffing for clients. With deep consideration of UAE rules & laws we manage outsourced staff in a professional manner .We have immense experience to source candidate of all nationalities in all verticals…… Start-ups to unicorn companies require skilled candidates. Our professional staffing solution provides staffing in IT, Sales, Marketing etc. Our solution adheres to matching employer's requirements with top candidates. Akshay's professional staffing solution has a decade of experience in recruiting for various professional niches in India and abroad……..Improve the organization's productivity by outsourcing payroll management to Akshay's payroll management services. We follow strict payroll and compliance practices & make sure that each and every employee gets paid on time. Outsourcing payroll management to Akshay's team would streamline your entire payroll management process."

7.5 On the website of Akshay testimonial of HDFC is mentioned which says that Akshay Software Technologies Ltd has been their preferred IT manpower vendor since 2010.

Akshay is also trading in SAP.

7.6 All these things explains that Akshay Software technologies Ltd is mainly in the business of supplying skilled manpower to clients, along with payroll services. It is also in SAP business. These activities are not Software Development. Therefore, Akshay Software Technologies Ltd is not functionally comparable to the Assessee company.

7.7 In addition to this in FY 2015-16, there has been a special event in Akshay which is mentioned in the Annual report.

Quote, "Revenue from operations for FY 2015-16 at Rs. 2484.67 lacs was higher by 14.04% over last year(FY 2014-15 Rs. 2178.73 lacs).Earnings before interest, tax, depreciation and amortisation (EBITDA)decreased from Rs. 6.82 lacs in FY 2014-15 to negative (Rs. 126.21 lacs) in FY 2015-16 due to reduction in export income on account disinvestment of the subsidiary… In FY 2015-16 there is one time credit (net) Rs. 447.13 lacs on account of net gain on sale of investment in wholly owned subsidiary".

7.8 This disinvestment and net gain of Rs. 447 lacs is one time event, has affected profit. But as mentioned in the Annual report the disinvestment has affected export income also. Therefore, considering this onetime event, the Akshay Software Technologies Ltd is not comparable to the assessee. Hence for all the reasons discussed above, we hold that Akshay Software Technologies Ltd is not functionally comparable to the assessee.

7.9 The Ld.AR has relied on various ITAT decisions but none of the decision has brought on record the fact of one time Disinvestment leading to profit and reduction of export, the manpower supply activity of the Akshya Software Technologies Ltd, hence all the case law relied by the AR are distinguishable on facts.

Following the above decision, we remit this issue to the TPO/AO for fresh decision in accordance with law after providing opportunity of being heard to the assessee."

8.5 We have gone through the financial statements placed at page No.1235 of PB. The corporate information of Akshay Software is as under:-

> "Akshay Software Technologies Ltd. ("the Company") is engaged in providing professional services and procurement, implementation and support of ERP products and services in India and Dubai."

8.6 Further we also note that the total employee benefit expenses is 93.90% of the revenue from operations and as per Note No.25 expenditure in foreign currency is Rs.23,27.99,126 which is 93.69% of the revenue from operations of Akshay Software. Considering the totality of facts, we remit this issue to the TPO/AO for fresh consideration following the decision of the Pune Tribunal in *SAS Research & Development India P. Ltd* (supra) after providing opportunity of hearing to the assessee and decide the issue in accordance with law.

Evoke Technologies Private Ltd.

9. The TPO held that the company is functionally different as it is engaged in diversified activities and segmental data is not available.

9.1 The DRP upheld the order of the AO stating that this company is not part of search matrix of TPO.

9.2 Before us, the ld. AR submitted that the company has single segment of Software Development Services and is therefore functionally similar and in this regard invited reference to Pg 1293,

1296 & Pg 1006 of PB I. He relied on the decision of *ADP Pvt. Ltd., Hyderabad vs DCIT-1(1), Hyderabad (TS-63-ITAT-2022 Hyd) (Para 12.4)*. He further submitted that this company passes all filters applied by the TPO and placed reliance on the decision of *Capco Technologies Private Ltd (supra)*.

9.3 The ld. DR relied on the orders of the revenue authorities.

9.4 We heard the rival submissions. It is clear from the order of the DRP that the DRP has not considered the plea of the Assessee in proper perspective. The fact that the TPO rejected the TP study of the Assessee cannot be the basis not to consider the claim of the Assessee for inclusion of comparable companies. The TPO excluded these companies only on the ground that the company is functionally different as it is engaged in diversified activities and segmental data is not available. In such circumstances, it was incumbent on the part of the DRP to have adjudicated the question of inclusion of these companies as comparable companies. The DRP noted that these companies do not figure in the search matrix of the TPO is not and cannot be a ground not to consider inclusion of these companies as comparable companies. We noted that from the Page No. 1006 of the paper book at para No. 6.17 The assessee has submitted before the DRP as under " The assessee further submits that company provides software development, IT outsourcing and IT consulting services. Further the company provides Application development & Maintenance, Big Data Analytics, Block Chain solutions , Mobile App

development and other services" The assessee has placed the financial statement at page No. 1284 to 1298 . Further we noted from the page No. 1296 at Note No. 2.26 the company has reported its turnover geographical-wise. As per this Note, the company has reported turnover in India Rs.6127.95 and in US 1300.22 (Total Rs.7428.17 in lakhs), whereas at Note No.2.16, the company has reported export turnover of Rs.73.84 crores and domestic turnover of Rs.0.44 crores. It appears that the figures are not matching with the profit & loss account. In this Note No.2.26 under the Segment Reporting, it has reported as under:-

> "The Company's operations predominantly relate to provide end-to-end business solutions to enable clients to enhance business performance. Georgraphic Segmentation ss based on business sourced from that geographic region and delivered both on-site and off-shore at 7106, Corporate Way, Dayton, Ohio, USA."

9.5 We note from the submissions from the DRP that the assessee itself has submitted that Evoke Technologies P. Ltd. is engaged in diversified activities as mentioned supra. However, the ld. AR of the assessee submitted before us that this company is engaged only in software development services. Considering the submissions from both the sides, we think it fit to send the matter back to the AO/TPO for fresh consideration. If the above comparable companies passes the FAR analysis it can be considered as comparable. The assessee is directed to submit necessary documents along with the complete Director's report of the Evoke Technologies Ltd. to substantiate its claim.

Ground No.6(ii) - Inclusion of Sagarsoft India Limited and Sasken Communication Technologies Limited

10. The ld. AR submitted that the TPO rejected these companies on the ground that they do not appear in the search matrix of the TPO which was confirmed by the DRP. The ld. AR submitted that Sagarsoft India Limited is functionally similar as it is engaged in rendering software development services and drew attention to Pg 1328 & 1338 and pg. 1012-1014 of PB I. He further submitted in the AY 2017-18 & 2018-19, the DRP has directed for inclusion of this company as comparable and in support of the argument the ld. AR relied on the judgment of *Capco Technologies Private Ltd. v. DCIT in IT(TP)A No.204/Bang/2021 (pg. 2488 of PB-II para 25.* The ld. AR further submitted that Sasken Communication Technologies Limited is also functionally similar as it is engaged in providing software consulting and development services and referred to Pg 1403, 1407, 1418 & 1015 of PB I. It was submitted that these companies pass all the filters applied by the TPO. Considering the arguments from both the sides, FAR analysis of these above two companies has not been done by the lower authorities. Therefore, this issue is remitted back to the TPO/AO for fresh consideration. Assessee is directed to produce necessary documents for substantiating its case.

10.1 Ground No.7(i) to (ii) & (iv) was not argued by the ld. AR of the assessee. Hence these are dismissed as not pressed.

10.2 The next issue vide **ground No.7(iii) & ground No.14(ii)** is regarding the lower authorities adopting inappropriate filter (like one sided turnover filter, persistent loss making filter), 15% RPT filter etc. in the process of selecting comparables. However, the issues regarding one sided turnover filter & persistent loss making filter was not argued by the assessee.

10.3 The ld. AR submitted Calculation of RPT Ratio has to be on aggregate basis taking ratio of RPT incomes plus RPT expenses by sales. If the RPT ratio is not applied on aggregate basis, the whole purpose of applying RPT filter would be lost because results may not be accurate. For example, related party purchases may be sold to third parties and thus profits from such transactions may be tainted. Similarly, purchases from third parties may be sold to related parties, and profits from such transactions may also be tainted. This would mean that approx. half of profit of such company may come from tainted transactions (Pages 988 to 992 of PB-I). He relied on the decision of the Coordinate Bench in the case of *JCIT, LTU (OSD) Circle-1, Bangalore vs M/s.Toyota Kirloskar Motors Private Limited (ITA No.2016/Bang/2018)* wherein the AO was directed to calculate RPT ratio on an aggregate basis taking the ratio of RPT income plus RPT expenses divided by operating income for all the comparable companies. Therefore, it was submitted that the RPT ratio should be applied on an aggregate basis to ensure that only uncontrolled transactions are compared as per mandate of Section 92F(ii). The ld. AR submitted that RPT filter of 15% should be adopted as it would

result in adopting better uncontrolled comparable companies. In this regard, reliance is placed on the following decisions:

- Yodlee Infotech Pvt Ltd ITA No 684 & 685/2017 (Kar HC)
- Barracuda Networks India Pvt Ltd v DCIT IT(TP)A No 229/Bang/2021 (Bang ITAT) – Page 2516 of PB-I

10.4 The ld. DR relied on the orders of lower authorities and submitted that the RPT filter applied by the TPO and confirmed by the DRP @ 25% is correct.

10.5 We have heard both the sides and perused the material on record. The coordinate Bench of the Tribunal in the case of *JCIT, LTU (OSD) v. Circle-1, Bangalore vs M/s.Toyota Kirloskar Motors Private Limited (ITA No.2016/Bang/2018) dated 18.8.2021* has held that the RPT ratio has to be consistently calculated on an aggregate basis taking the ratio of RPT income plus RPT expenses by sales. The relevant observations are as follows:-

> "7.4 We have heard rival submissions and perused the material on record. There is nothing on record to suggest how RPT ratio has been calculated for all the comparable companies. The learned AR has argued that the TPO in order to retain Tata Motors Ltd. and Maruti Suzuki India Limited has deviated and adopted a new mechanism for computing RPT ratio. On a query from the Bench how RPT ratio has been calculated for other comparables, the learned AR has unable to point out the same. The RPT ratio has to be consistently calculated on an aggregate basis taking the ratio of RPT income plus RPT expenses by sales. The said position was adopted by the Revenue in the past years. In this regard, the TPOs order in assessee's own case for assessment year 20072008 has been placed on record. A perusal of the same it is clear that RPT ratio has been calculated taking both RPT income transactions plus RPT expenses transactions on

> aggregate basis. On the facts of this case, it is not clear how RPT ratio has been calculated for Tata Motors Limited vis-à-vis other comparable companies. Therefore, this issue is restored to the files of the A.O. The A.O. is directed to calculate RPT ratio on an aggregate basis taking the ratio of RPT income plus RPT expenses by sales across the board for all the comparable companies (including Tata Motors Ltd. and Maruti Suzuki India Limited.
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> 7.5 Therefore, ground No.2 is allowed for statistical purposes."

10.6 Following the above decision, we direct the AO to calculate RPT ratio on aggregate basis considering the RPT income plus RPT expenses by sales for all the comparable companies.

10.7 The issue regarding adoption of rate of RPT filter was considered by the Hon'ble High Court of Karnataka in *PCIT v. Yodlee Infotech P. Ltd. in ITA NO.685/2017 dated 28.6.201.* The AO/TPO is directed to follow the above judgment for applying the RPT filter rate.

11. The next issue vide **ground No.7 (v)** by the assessee is regarding exclusion of following companies :-

(i) Larsen & Toubro Infotech Ltd.
(ii) Nihilent Ltd.
(iii) Inteq Software Pvt. Ltd.
(iv) Persistent Systems Ltd.
(v) Infobeans Technologies Ltd.
(vi) Thirdware Solution Ltd.
(vii) Infosys Ltd.
(viii) Aspire Systems (India) Pvt. Ltd.
(ix) Cybage Software Pvt. Ltd.

Larsen & Toubro Ltd., Persistent Systems Ltd. & Infosys Ltd.

11.1 The assessee sought for exclusion of these 3 companies on various reasons. However, the TPO retained these companies which was upheld by the DRP.

11.2 The ld. AR submitted that **Larsen & Toubro** is functionally different and it is engaged in diversified activities like infrastructure management services, digital consultation, data and analytics and is not a pure software development company. The services are provided under two segments, namely Services cluster and Industrial cluster. Software service segmental data is not available. The Company has substantial onsite operations for all 3 FYs and business model is different. It has global brand value and business spread across borders. The Company acquired another entity in FY 2014-15.

11.3 Regarding **Persistent Systems Ltd**., the ld. AR submitted that this company has substantial RPT transaction for all 3 years (FY 15-16 – 32.04%; FY 2014-15 – 31.32% and FY 13-14 – 21.41%). It is functionally different as it is engaged in both rendering software services & developing software products. The Company has IP business under the brand called 'Accelerite'. Segmental information pertaining to software development services is not available for all 3 years. The Company has incurred substantial R&D expenditure and undertaken business restructuring and acquisition during the year.

11.4 The ld. AR further submitted that **Infosys Ltd**. is functionally different as it is much larger company engaged in diversified activities and not a pure software development company. It has global brand

image and owns intangible assets worth Rs.4,543 crores. There is vast difference between the profile of Infosys and the Appellant. The Company has substantial onsite revenue, thus, different business model and has undertaken business restructuring during the year.

11.5 The ld. AR also submitted that the above 3 companies were excluded in the assessee's own case for the AY 2012-13 in ITA No.113/Bang/2018 dated 5.12.2019. He also relied on the decision of the Tribunal in the case of SanDisk India Device Design Centre Pvt. Ltd. in ITA No.288/Bang/2021 dated 30.6.2022 for AY 2016-17.

11.6 The ld. DR relied on the orders of the lower authorities.

11.7 We have considered the rival submissions and perused the material on record. The coordinate Bench of the Tribunal in the assessee's own case for AY 2012-13 (supra) in respect of the above 3 comparables held as under:-

> "8. The learned counsel for the brought to our notice a decision of the ITAT Bangalore Bench in the case of CGI Information Systems & Management Consultants (P.) Ltd. v. Asstt. CIT [2018] 94 taxmann.com 97 wherein 4 out of the aforesaid five comparable companies viz., (a) Genesys International Corpn. Ltd. (b) Infosys Ltd., (c) Larsen and Toubro Infotech Ltd. and (d) Persistent Systems Ltd. were excluded by the ITAT. The functional profile of the Assessee in this appeal and that of the Assessee in the decision cited by the learned counsel for the Assessee is the same. The following were the relevant observations of the Tribunal:—
>
> "28. The learned counsel for the Assessee submitted before us that the comparability of the 3 companies out of the aforesaid 4 companies which the Assessee seeks to exclude from the list of

comparable companies chosen by the TPO viz., Infosys Ltd., Larsen & Toubro Infotech Ltd. and Persistent Systems Ltd., were considered by the ITAT Delhi Bench in the case of Agilis Information Technologies India (P) Ltd. v. ACIT (2018) 89 taxmann.com 440 (Delhi-Trib.) for the same AY 2012-13. In this regard it was submitted that the functional profile of the Assessee is same as that of the Assessee in the case of Agilis Information Technologies India (P) Ltd., is identical in as much as the said company was also involved in providing SWD services to its AE and the TPO had chosen 16 comparable companies out of which 6 companies chosen by the TPO in the case of the Assessee for the purpose of comparability were the same. His submission was that the decision rendered by the Tribunal in the case of Agilis Information Technologies India (P) Ltd., (supra) would be equally applicable to the Assessee in the present case also. The learned DR submitted that the DRP in its directions has merely accepted with the reasoning of the TPO and therefore the issue of exclusion of these companies should be directed to be examined afresh by the DRP.

29. We have considered the rival submissions. In the case of Agilis Information Technologies India (P) Ltd., (supra), this Tribunal considered the comparability of the 3 companies which the Assessee seeks to exclude from the final list of comparable companies chosen by the TPO. The functional profile of the Assessee and that of the Assessee in the case of Agilis Technologies India (P) Ltd., is identical in as much as the said company was also involved in providing SWD services to its AE and the TPO had chosen some comparable companies which were also chosen by the TPO in the case of the Assessee for the purpose of comparability. In the aforesaid decision the Tribunal held on the comparability of the 3 companies which the Assessee seeks to exclude as follows:

(a) Infosys Ltd., was excluded from the list of comparable companies by following the decision of the Hon'ble Delhi High Court in the case of CIT v. Agnity India Technologies (2013) 36 taxmann.com 289 (Delhi). The discussion is contained in paragraphs 4.5 to 4.7 of the Tribunal's order. The Tribunal accepted that Infosys Ltd. is a giant risk taking company and engaged in development and sale of software products and also

owns intangible assets and therefore not comparable with a software development service provider such as the Assessee in that case.

(b) Larsen & Toubro Infotech Ltd., was excluded from the list of comparable companies by relying on the decision of the Delhi Bench of ITAT in the case of Saxo India (P) Ltd. v. ACIT (2016) 67 taxmann.com 155 (Del-Tri). The discussion is contained in paragraphs 4.8 to 4.10 of the Tribunal's order. The Tribunal held that L & T Infotech Ltd., was a software product company and segmental information on SWD services was not available. The Tribunal also noticed that the appeal filed by the revenue against the tribunal's order was dismissed by the Hon'ble Delhi High Court in ITA No.682/2016.

(c) Persistent Systems Ltd., was excluded from the list of comparable companies on the ground that this company was a software product company and segmental information on SWD services was not available. The Tribunal in coming to the above conclusion referred to the decision rendered by ITAT Delhi Bench in the case of Cash Edge India (P.) Ltd. v. ITO ITA No.64/Del/2015 order dated 23.9.2015 and the decision of Hon'ble Delhi High Court in the case of Saxo India Pvt. Ltd. (supra). The findings in this regard are contained in Paragraphs 4.14 to 4.16 of its order.

30. Respectfully following the decision of the Tribunal we hold that the aforesaid 3 companies be excluded from the final list of comparable companies for the purpose of arriving at the arithmetic mean of comparable companies for the purpose of comparison with the profit margins. In this regard we are also of the view that the plea of the learned DR for a remand of the issue to the DRP on the ground that the DRP has not given any reasons in its directions cannot be accepted. The DRP has endorsed the view of the TPO in its directions and therefore the reasons given by the TPO should be regarded as the conclusions of the DRP."

11.8 The coordinate Bench Tribunal considered the issue in respect of the above companies in the case of SanDisk India Device Design

Centre Pvt. Ltd. in ITA No.288/Bang/2021 dated 30.6.2022 for AY 2016-17 and it was held to exclude the same. The relevant observations are as under:-

> "17.6 We have perused the submissions advanced by both sides in the light of records placed before us.
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> 17.7 He placed reliance on the decision of Coordinate Bench of this Tribunal in case of OLF (India) Software Pvt. Ltd. vs. ACIT (supra) wherein this Tribunal following its decision in case of LSI India research development (P.) Ltd. vs. DCIT reported in [2021] 124 taxmann.com 83, excluded Persistent Systems Ltd., L&T Infotech Ltd., Thirdware Solutions and Infosys Ltd. by observing as under:
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> "3.2 This Tribunal in LSI India research development (P.) Ltd. v. DCIT (supra) observed in respect of persistent systems, L & T Infotech, Thirdware Solutions, Infosys Ltd. as under:
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> 16. As far as the challenge by the assessee on exclusion of aforesaid 5 companies in ground No. 2(f), the ld. counsel for the assessee has brought to our notice a decision of Bangalore Bench of ITAT for the very same Assessment Year 2014-15 in the case of LG Soft India (P.) Ltd. v. DCIT [IT(TP) Appeal No. 3122 (Bang.) of 2018, dated 28-5-2019]. In this order rendered in a case of assessee rendering SWD services such as the assessee, the Tribunal excluded 3 out of 5 companies referred to in the earlier paragraph and remanded 1 company for fresh consideration with the following observations:-
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> 6. We notice that the co-ordinate bench has excluded M/s Infosys Ltd in AY 2008-09 by following the decision rendered by another co-ordinate bench in the case of 3DPLM Software Solutions Ltd (IT(TP)A No. 1303/Bang/2012 dated 28-11-2013, wherein the decision rendered in the case of Triology E Business Software India P Ltd (ITA No. 1054/Bang/2011) was followed and it was held that M/s Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge

revenues from software products. It was further observed that the break-up of revenue from software services and software product is not available.

6.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Infosys Ltd.

7. In AY 2008-09, the co-ordinate bench has excluded M/s Persistent Systems Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd (supra), where in it was held that M/s Persistent Systems Ltd is engaged in product development and product design services while the assessee is a software development service provider. Further, the segmental details were not available. 7.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Persistent Systems Ltd.

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17. As far as exclusion of Larsen & Toubro Infotech Ltd., is concerned, the Tribunal in the very same case of LG Soft (P.) Ltd. (supra) in another order dated 27-9-2019 in MP No. 95/Bang/2019 held that exclusion of Larsen & Toubro Infotech Ltd., was omitted to be adjudicated in the original order dated 28-5-2019 passed by the Tribunal referred in the earlier paragraph and held that Larsen & Toubro Infotech Ltd., is also not a comparable company because there were extraordinary events that occurred in the relevant previous year and that it possessed brand and intangibles and there was no segmental information of sub-contracting expenses".

3.3 There is nothing on record brought by the Ld.CIT.DR in order to establish that these are comparable with assessee that is a captive service provider which functions at the strict supervision and instructions by the AE's. Further we note that turnover criteria has to be applied with an upper limit which is not been considered by the Ld. TPO. The TPO has applied less than 1 crore turnover limit to eliminate the comparables however it failed to apply upper limit considering the functions performed

> assets owned and risk assumed by assessee under this segment for the year under consideration."
>
> 17.8 Before us, the Ld.AR has not been able to place anything on record contrary to the above observation. We therefore respectfully following the above view, direct the Ld.AO/TPO to exclude Persistent Systems Ltd., L& T Infotech Ltd., Thirdware Solutions and Infosys Ltd. from the final list."

11.9 Respectfully following the above decisions of the coordinate Bench of the Tribunal in assessee's own case for AY 2012-13 and SanDisk India Device Design Centre Pvt. Ltd. (AY 2016-17), we direct exclusion of these 3 companies i.e., **Larsen & Toubro Ltd., Persistent Systems Ltd. & Infosys Ltd.** from the final list of comparables.

Nihilent Ltd., Infobeans Technologies Ltd., Thirdware Solutions Ltd. & Aspire Systems Ltd.

12. The assessee submitted that these 4 companies were to be excluded for different reasons which was not accepted by the TPO and he retained these as comparables, which the DRP upheld.

12.1 The ld. AR submitted that Nihilent Ltd. is functionally different as it is engaged in software product development. It operates in different geographical region i.e., mainly in South Africa and cannot be compared to rendering services to AE in USA. The Company has substantial RPT transaction for FY 14-15 (RPT at 16.85%).

12.2 He submitted that Infobeans Technologies is also functionally different as it is a global technology solutions provider of diversified services in the areas of Custom Application Development, Content

Management Systems, Enterprise Mobility, Big Data Analytics. It is not a pure software development company.

12.3 Similarly, the ld. AR submitted that Thirdware Solutions Ltd. is functionally different as company has revenue from various sources like Product Sale, Software Implementation, Software Consolidation, Analytics etc. and it is not a pure software development company. The Company has substantial RPT transaction for all 3 years. (FY 15-16 – 24.87%; FY 2014-15 – 23.46% and FY 13-14 – 23.03%). Segmental information pertaining to software development services is not available for all 3 years.

12.4 He submitted that Aspire Systems (India) Private Limited also has substantial RPT transaction for all 3 years. (FY 15-16 – 37.58%; FY 2014-15 – 30.12% and FY 13-14 – 26.86%). Further, Applied Development Software (India) Pvt Ltd and PureApps Consulting Services Pvt Ltd have been amalgamated with the Company.

12.5 Thus, the ld. AR relied on the decision in the case of SanDisk India Device Design Centre Pvt. Ltd. in ITA No.288/Bang/2021 dated 30.6.2022 for AY 2016-17 and submitted that the above 4 companies are to be rejected as comparables.

12.6 The ld. DR relied on the orders of the lower authorities.

12.7 We have considered the rival submissions and perused the material on record. These 4 companies were considered by the coordinate Bench of the Tribunal in the case of SanDisk India Device

Design Centre Pvt. Ltd. in ITA No.288/Bang/2021 dated 30.6.2022 for AY 2016-17 and it was held as under:-

> "17.6 We have perused the submissions advanced by both sides in the light of records placed before us.
>
> 17.7 He placed reliance on the decision of Coordinate Bench of this Tribunal in case of OLF (India) Software Pvt. Ltd. vs. ACIT (supra) wherein this Tribunal following its decision in case of LSI India research development (P.) Ltd. vs. DCIT reported in [2021] 124 taxmann.com 83, excluded Persistent Systems Ltd., L&T Infotech Ltd., Thirdware Solutions and Infosys Ltd. by observing as under:
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> "3.2 This Tribunal in LSI India research development (P.) Ltd. v. DCIT (supra) observed in respect of persistent systems, L & T Infotech, Thirdware Solutions, Infosys Ltd. as under:
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> 16. As far as the challenge by the assessee on exclusion of aforesaid 5 companies in ground No. 2(f), the ld. counsel for the assessee has brought to our notice a decision of Bangalore Bench of ITAT for the very same Assessment Year 2014-15 in the case of LG Soft India (P.) Ltd. v. DCIT [IT(TP) Appeal No. 3122 (Bang.) of 2018, dated 28-5-2019]. In this order rendered in a case of assessee rendering SWD services such as the assessee, the Tribunal excluded 3 out of 5 companies referred to in the earlier paragraph and remanded 1 company for fresh consideration with the following observations:-
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> "5. The Ld A.R submitted that M/s Infosys Ltd, M/s Persistent Systems Ltd and M/s Thirdware Solutions Ltd have been excluded by the co-ordinate bench in the assessee's own case in AY 2008-09 in IT(TP)A No. 1673/Bang/2012.
>
> *******
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> *******
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> 7.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY 2008-09, we direct exclusion of M/s Persistent Systems Ltd. We

also notice that in AY 2008-09, the co-ordinate bench has excluded M/s Thirdware Solutions Ltd also by following the decision rendered in the case of 3DPLM Software Solutions Ltd. (supra), where in it was held that M/s Thirdware solutions Ltd is engaged in product development and earns revenue from sale of licenses and subscription. Further, the segmental details were not available.

8.1 It was stated that there is no change in facts. Accordingly, following the decision rendered in the assessee's own case in AY

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17.8 Before us, the Ld.AR has not been able to place anything on record contrary to the above observation. We therefore respectfully following the above view, direct the Ld.AO/TPO to exclude Persistent Systems Ltd., L& T Infotech Ltd., Thirdware Solutions and Infosys Ltd. from the final list.

17.9 In respect of Nihilent Ltd., Infobeans Technologies Ltd. and Aspire Systems (India) Pvt. Ltd., Hon'ble Mumbai Tribunal in case of Red Hat India Pvt. Ltd. vs. Addl. CIT (supra) observed as under:

"Comparable Sought to be excluded by the assessee Aspire System India Pvt. Ltd. (Aspire)

40. The assessee sought exclusion of Aspire from the final set of comparables for benchmarking SDS segment on the ground that it fails Related Party Transaction (RPT) filters as its RPT/ sales ratio is more than 25%. The assessee computed the significant related party transactions at 37.58% whereas the Ld. TPO computed it at 23.55%. The TPO is directed to recalculate the RPT/sales ratio by providing opportunity of being heard to the assessee. So this comparable is remitted back to the Ld. TPO to decide afresh."

<u>"Nihilent Analytics Ltd. (Nihilent)</u>

44. The assessee sought exclusion of Nihilent on ground of its functional dissimilarity vis-à-vis assessee. We have examined the website information of Nihilent, made available by the assessee

at page No.405 of the paper book, wherein it is mentioned that it is engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data science, cloud services etc.

45. Perusal of the disclosure of enterprise's reportable segment explanatory available at page No.A406 of the paper book shows that Nihilent is engaged in software development and consultancy, engineering services, web development and hosting and subsequently diversified itself into the domain of business analytics and business process outsourcing and financials of Nihilent available at page No.A304, A405-A406 of the paper book shows that Nihilent has only one business segment and in the absence of segmental financials, as it is into diversified business, this company cannot be a valid comparable vis-à-vis assessee, who is a low risk entity working on cost + markup model. Hence, Nihilent is ordered to be excluded as a comparable.

Nihilent Ltd.

46. The assessee sought exclusion of Nihilent Ltd. as a comparable on the ground that it is functionally dissimilar vis-à-vis assessee. This objection was also raised before the Ld. DRP but rejected. The assessee relied upon website of the company which is made available at page A412 of the paper book wherein Nihilent Ltd. is shown to be engaged in providing advanced analytics, artificial intelligence, blockchain, business intelligence, data signs, cloud services etc. The annual financials of this company available at page A412 & A413 of the paper book shows that it is rendering Enterprise transformation and change management, Digital transformation services and Enterprise IT services but segmental financials are not available as is apparent from its financials available at page A305, A412 & A413 of the paper book. When this company is into various segments but segmental financials are not available it cannot be a valid comparable vis-à-vis assessee which is a routine software development service provider working on cost + markup model, hence ordered to be excluded."

"Infobeans Technologies Ltd. (Infobeans)

> 49. The assessee sought exclusion of Infobeans on the ground that it is also functionally dissimilar being into providing business IT services (CAD) (application development and maintenance, Big Data, UX and UI, Automation engineering services, including product engineering and lifestyle solutions and business process management) in verticals of storage and virtualization, media and publishing, HR and Payroll and e-commerce. It is also providing software engineering services primarily in Custom Application Development (CAM), enterprise mobility and Big Data Analytics (BDA). 50. Perusal of financials available at page A303, A418 to A421, Infobeans shows that it is into diversified services but its segmental financials are not available without which it is difficult to compute the correct profit margin of the relevant segment. So Infobeans is also ordered to be excluded as a comparable being not a comparable to the assessee."
>
> 17.10 Perusal of the annual report, filed before us in respect of the above two comparables, we note that the segmental financials are not available in respect of Nihilent and Infobeans and the RPT in respect of Aspire Systems India Pvt. Ltd. is more than 25% being the threshold limit considered by the Ld.TPO. Nothing has been placed before us by the Ld.DR in order to take a different view. Respectfully following the Hon'ble Mumbai Tribunal, we direct the Ld.TPO to exclude Nihilent, Infobeans and Aspire Systems from the final set."

12.8 Respectfully following the above decision of the coordinate Bench, we direct exclusion of Nihilent, Infobeans, Thirdware Solutions Ltd. and Aspire Systems (India) P. Ltd. from the comparables. However, the assessee has vide **ground No.8** has submitted that the revenue authorities have incorrectly computed the operating profit margin of Aspire Systems (India) Ltd. We remit this issue to the TPO/AO for proper computation of the operating profit margin and decide the issue only with regard to

Aspire Systems (India) P. Ltd. in accordance with law in the light of the decision in SanDisk India Device Design Centre Pvt. Ltd. (supra) which has been extracted above.

Inteq Software Ltd.

13. The ld. AR submitted that Inteq Software Ltd. is functionally different as it is engaged in both rendering software services & developing software products. The Company owns substantial intangibles and cannot be compared to the assessee. The Company has substantial RPT transaction for FY 13-14 (79.45%). It was further submitted that despite directions by DRP to exclude FY 13-14 for PLI computation, the TPO has considered all the 3 years. Therefore this company has to be excluded from the comparables list.

13.1 The ld. DR relied on the orders of lower authorities.

13.2 We have heard both the sides and perused the material on record. On going through the submissions made before the lower authorities which is placed at page 1039, para 6.103, the assessee submitted as under:-

> "The Assessee submits that this company is functionally different as it is engaged in both rendering software services and developing software products. Further, it provides wide range of services such as Application Development, Application Migration, Application Maintenance, Oracle Application, Microsoft Dynamics, Data Warehousing, EI & EDI Services, Consulting Services, Healthcare BPO. These are evident from company's website which is reproduced below."

13.3 On going through the financial statements produced at PB pg. 1559, under the head revenue from operations, the assessee has shown revenue from operations under the accounting head, Software Development & Service Charges of Rs.17.38 crores and at PB pg. 1557 in Form No.NGT-9 which is annual return, the assessee has shown software development services under NIC Code "620-Computer Programming, Consultancy and related activities". This company has been excluded in the case of *Finastra Software Solutions (India) P. Ltd. v. DCIT, AY 2016-17 [2023] 147 taxmann.com 515 (Bengaluru Trib)* by observing as under:-

> 18.The assessee sought for exclusion of Inteq Software Pvt. Ltd. and Infobeans Technologies Ltd. on the basis that these companies are functionally dissimilar to the assessee. In this regard the learned A.R. submitted that
> *Inteq Software Pvt. Ltd. ("Inteq")*
> The company is functionally dissimilar to the assessee. The company is engaged in diversified business lines such as Microsoft dynamics, data warehousing, EI & EDI services, Healthcare BPO and consulting services including provision of end-to-end solutions to clients in the nature of back office services, transaction-based services, MIS and analytical reporting services. Thus, Inteq is not comparable to the software development functions of the assessee. It is further submitted that the segmental details attributable to the various services rendered by the company is not available and is instead shown as "software development and service charges" under one head. Detailed submissions are available at pages 1911-1914 of the paper book.
> *Significant related party transactions:*
> The company's related party transactions (sales) for the FY 2013-14 stand at 79.49% of sales, and therefore the company ought to be excluded.
> *Wide fluctuation in the margin:*
> It is submitted that the company's margin fluctuate widely, suggesting that there exists a peculiar economic circumstance. For the FY 2013-14, the company's margin stood at 47.21%, for the FY 2014-15 32.14% and for the FY 2015-16 7.56%. Detailed submissions in this regard are placed at pages

419-436 of the paper book. In view of the above, it is submitted that Inteq ought to be excluded from the final list of comparables.

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21. We have heard the rival contentions and perused the material on record. We notice that the coordinate bench in the case of *NTT Data FA Insurance Systems (India) (P.) Ltd*. (*supra*) has considered the issue of exclusion of Inteq Software Pvt. Ltd. and Infobeans Technologies Ltd. and held as under:-

'18. We have heard the rival submissions and perused the materials available on record. In our opinion, this comparable was considered by the Hyderabad Tribunal in the case of ADP Pvt. Ltd. in ITA No. 227 & 228/Hyd/2021 dated 3-2-2022 at para 7 page 3678 to 3680 wherein held as under:-

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21. We have heard the rival submissions and perused the materials available on record. This comparable has considered in the case of *Global Logic India Pvt. Ltd.* v. *DCIT* (2022) 134 Taxmann.com 35 for the assessment year 2016-17, wherein held as under:-

46. "The taxpayer sought exclusion of Inteq again on account of functional dissimilarity being into providing outsourced product development services and Healthcare BPO services to its customers as per website extracted at pages 83 to 85 of the appeal memo set. It being a private limited company its financials are not available in the public domain. Its annual report made available at pages 848 to 909 of the annual reports paper book does not provide segmental profitability earned from software development services, outsourced product development services and Healthcare BPO services.

47. When we examine profit & loss account at page 873 of the annual report paper book, software development and service charges are shown in composite manner with no segmental profitability. In these circumstances, we are of the considered view that Inteq is not a suitable comparable *vis-a-vis* the taxpayer which is a routine software development service provider working on costplus mark up model, hence ordered to be excluded from the final set of comparables."

21.1 In view of the above order of the Tribunal, we direct the AO/TPO to exclude this company from the list of comparables.'

22. Respectfully following the decision of the coordinate bench we hold that Inteq Software Pvt. Ltd and Infobeans Technologies Ltd., be excluded from the list of comparables."

13.4 Respectfully following the above decision of the Tribunal, we direct exclusion of Inteq Software Pvt. Ltd. from the comparables.

Cybage Software Pvt. Ltd

14. As regards Cybage Software Pvt. Ltd., the ld. AR submitted that it is retained by the lower authorities as a comparable. The Company is functionally different as it is engaged in both rendering software services & developing software products and hence not comparable with assessee. He placed reliance on the decision of the Pune Tribunal in the case of *Optiva India Technologies Pvt. Ltd. in ITA No.194/PUN/2021 for the AY 2016-17 dated 21,07.2022* wherein it was held as under:-

> "**17.1** The assessee contends that this company is mainly Onsite service provider whereas the assessee is offsite service provider and therefore, functionally different. Further, there is incorrect reporting figures which are unreliable. This company is product development as well as R & D Intensive Company. The arguments of the assessee were not accepted by the A.O/T.P.O and the company was held to be comparable. The ld. A.R demonstrated through Annual Report at page 1804, as per the description of the business of this company that it is onsite service provider. Furthermore at page 1796 of the Annual Report this company is doing other computer related activities but nowhere software services are mentioned. On the other hand, the assessee is offsite provider and thus functionally different. We direct the A.O/T.P.O to exclude this company from the list of comparables."

14.1 Having heard both the sides, we find that this company is rendering software services as well as developing software products unlike the assessee. Following the above decision of the Pune

Tribunal, we direct exclusion of Cybage Software Pvt. Ltd. from the comparables.

Provision for doubtful debt

15. **Ground No.9** is regarding the treatment of provision for doubtful debt as non-operating in nature. The ld. AR submitted that bad or doubtful debts are associated with sales activity and is a normal incidence of business. Therefore, the provision for bad or doubtful debt is to be treated as operating expenses and considered be as operating in nature while computing operating margins of comparables. Reliance is placed on the following decisions:-

- ADP Pvt. Ltd., Hyderabad vs DCIT-1(1), Hyderabad (TS-63-ITAT-2022 Hyd) (Pg 2447 of PB-II)
- Techbooks International (P.) Ltd. vs DCIT, Circle-3, Noida [2015] 63 taxmann.com 114 (Delhi - Trib.) (Pg 2546 of PB-II)

15.1 The ld. DR relied on the orders of the lower authorities. He also relied on the decision of the Tribunal in the case of Marvell India Pvt. Ltd., ITA No.2173/Bang/2017 for AY 2013-14 dated 6.4.2018 where it was held as under:-

> "6. From the above Para of this Tribunal order, it comes out that in that case, the issue involved was regarding writing back of the provision by the assessee in the present year. The Tribunal order in this case is on this basis that certain liabilities are provided on estimate basis because exact quantification is not possible in the same year for some expenses and when in future year, the actual amount of liability is known then any excess provision made in the earlier year has to be written back and the same has to be considered as operating income for the purpose of computing ALP also. In our considered opinion, this Tribunal order is not

applicable in the present case because in the present case, the issue involved is regarding provision for bad and doubtful debts and not writing back of excess provision in earlier years. There is major difference in the nature of these two items. Writing back of excess provision is on this basis that provision is made on estimate basis in a given year because exact quantification is not possible in the same year for some expenses and when exact amount of liability is determined in a future year in which actual amount is known then excess provision if any is written back and more provision is made if the provision made earlier is short. But in that year also, similar provisions are made on estimate basis in respect of liability incurred in that year and it is an ongoing process and therefore, neither the provision made can be excluded nor the excess provision written back can be excluded. But in the present case, the issue in dispute is regarding provision for bad and doubtful debts made in the present year. This is not the case of the assessee that sale were accounted for in earlier year on estimate basis and now the exact amount of sales is known and therefore, the excess amount of debts created in earlier year on estimate basis is to be reduced now to make at par with actual debt. In the present case, actual sales were accounted for in earlier years and debts were created in earlier years on the basis of actual sales and invoices and now, the provision is made when it is seen that the recovery of such debt is doubtful. We would like to observe that the whole purpose of TP study and TP exercise is to compare the price charged by the assessee for its income or prices paid by the assessee for its expenses from or to its AE and for that purpose, we use various methods including TNMM as per which, the profits of tested party and uncontrolled comparables are compared to come to conclusion that prices are at arms length or not. If the sale is made in an earlier year and provision for doubtful debts is made in a later year and in such a later year, such provision for doubtful debts made is reduced from the profit of the tested party or of the comparables, such provision for doubtful debts cannot be considered for reduction from the profit because for the purpose of transfer pricing analysis after determining the profit of the tested party or comparable, profit percentage is worked out by dividing such profit of the tested party/comparable by its turnover. If the provision for doubtful debts is reduced from profit, the numerator

> is reduced but the denominator is not reduced because the turnover has been considered in earlier year and cannot be considered in the present year. Hence such provision for doubtful debts has to be ignored and added back in the profit of the tested party or of the comparable as the case may be while making the TP analysis. Hence on this issue, we find no reason to interfere in the order of AO and DRP and we hold that this Tribunal order is not applicable in the present case but we will also examine the applicability of the second tribunal order cited before us by the learned AR of the assessee."

15.2 After hearing the rival contentions, during the course of hearing, a query was raised to the ld. AR whether the provision for doubtful debts relate to the present assessment year or other year, but the ld. AR was unable to reply. Therefore, the case law relied by the ld. AR is not applicable. We remit this issue to the AO/TPO for verification of this issue afresh after providing opportunity to the assessee. If the doubtful debts is relating to the current assessment year, then it should be treated as operating expenditure. But if it relates to other years, then it cannot be allowed as operating expenses as held by the Tribunal in the case of Marvell India Pvt. Ltd. (supra).

16. **Ground Nos. 10 & 16** by the assessee are that despite directions of DRP, the TPO erred in considering the Fixed Assets written off as operating in nature while computing margins of the assessee. The ld. AR submitted that fixed assets written off should be excluded from the operating cost, while computing the margins of the assessee.

16.1 We have heard both the sides and perused the material on record. The DRP has directed the AO/TPO to consider the fixed assets write off as non-operating with the following observations:-

> "2.6.3.1 Having considered the submissions, we note that the fixed assets do not directly impact the P&L account or operating margins of the company. Revenues/expenses on account of fixed assets written off are not expenses incurred in earning the operating revenue. The fixed assets being a balance sheet of item and write off of the same cannot have impact on operating profits of a particular year. Besides, the write off relate incomes/expense are in no way related to the operating revenue earned during the year, and hence cannot be taken into account in determining the operating profit for the year. ……."

16.2 Accordingly, we remit this issue to the AO/TPO to follow the directions of the DRP on this issue.

CASH PLI

17. **Ground No.11** of Software Development Segment (SWD) reads as follows:-

> "11. The lower authorities have erred in :
>
> (i) Not adopting Cash PLI for computation of arm's length price;
>
> (ii) Not recognizing that the Appellant was insulated from risks, as against comparables, which assume these risks and therefore have to be credited with a risk premium on this account; and
>
> (iii) Not providing R&D adjustment and marketing adjustment while computing the Arm's length price."

17.1 **Ground No.17(i)** in Marketing Support Segment (MSS) is identical to Grounds 11(i) .

17.2 The assessee has made common submissions with regard to Cash PLI in both SWD and MSS segments. The ld. AR submitted that

it was contended before the TPO that either Cash PLI should be adopted or depreciation adjustment should be granted, which was however rejected by the TPO and there is no discussion on this aspect in the TP order. Before the DRP, the Appellant made detailed submissions on why cash PLI should be adopted (Pg 1082 to 1091 of Paper Book I for Software Segment & Pg 1144 to Pg 1146 of Paper Book I for Marketing Segment). The DRP upheld the action of TPO.

17.3 In this regard, the ld. AR submitted that the rate of depreciation charged by the assessee is substantially more than the comparable companies/sector industry norms. The assessee's depreciation cost to the total cost is around 5.91%, which is higher than the weighted average for 3 years of final comparables, which is at 3.51% and invited attention to the computation at Pg 1938 of Paper Book I and also, the detailed margin computation at Pg 397 & 398 of Paper Book I. It was contended that Cash PLI should be adopted for PLI computation and relied on the following decisions:-

- PCIT v Novell Software Development India (P.) Ltd [2021] 126 taxmann.com 29 (Karnataka) wherein the Karnataka HC directed to exclude depreciation from operating cost.
- Assessee's own case for AY 2010-11 wherein the ITAT in has upheld the direction of DRP to grant depreciation adjustment - [Para 9.3 to 9.5 of the order]. & AY 2011-12 & AY 2012-13 The DRP has accepted the Cash PLI adjustment as sought by the assessee.

17.4 In assessee's own case for AY 2010-11, [2015] 64 taxmann.com 468 (Hyd. - Trib.) the Hyderabad Tribunal on this issue held as under :-

"**9.3** As regards ground No. 4, Ld. AR submitted that depreciation adopted by assessee was at higher side due to the fact that the estimated life of the assets are 3 years and 5 years. The cost of depreciation is high compared to other comparable companies. He submitted that the depreciation shall be excluded from the variable cost of all the comparable companies including assessee to determine the ALP. He relied on the following case laws:

1. *BA Continuum India (P.) Ltd.* TS-490-HC-2014 (TELandAP)-TP
2. *BA Continuum India (P.) Ltd.* v. *Asstt. CIT* [2013] 40 taxmann.com 311 (Hyd.)
3. *Market Tools Research India (P.) Ltd.* v. *Asstt. CIT* [2013] 32 taxmann.com 358/[2014] 150 ITD 296 (Hyd.)

9.4 Ld. AR also submitted the comparative tables on depreciation as below:

……..

……..

9.5 In our considered view, the method of depreciation adopted by the various comparable companies has an impact on the operating result of the respective comparable companies, which is highlighted in the above charts. The assessee company's percentage of depreciation to total expenditure is 12.80% whereas the mean of the comparable companies are 5.26%. We notice, there is considerable impact on the operating result. Hence, we agree with the DRP that the depreciation should be considered for evaluating the operating results of the comparables.

11.6 In the result, revenue ground No. 4 is dismissed."

17.5 Further, the jurisdictional High Court in the case of *PCIT v Novell Software Development India (P.) Ltd [2021] 126 taxmann.com 29 (Karnataka)* while considering similar issue held as follows:-

"7. Now we may advert to the third substantial question of law. Rule 10B of the Income-tax Rules, 1962 provides the method in which comparability analysis is to be conducted under transactional net margin method. Under sub-clause (i) of rule 10B(l)(e), the net profit margin realized by the tax payer from an international transaction is computed having regard to the relevant base that is costs incurred and sales effected, etc. Under sub-clause (ii) of rule 10B(l)(e), the net profit margin is realized by an unrelated enterprise/comparable company is computed having regard to the same relevant base as was selected in sub-clause (i). Sub-clause (iii) of said Rule specifies that before a comparison of net margins realized under sub-clauses (1) and (ii) is done, the net margin realized under sub-clause (ii) must be adjusted to take into account the differences which could materially affect the net profit margin in the open market. So also, in terms of Rule 10B(3), an uncontrolled transaction shall be considered comparable if none of the differences between the comparable companies and the controlled transaction are likely to materially affect the profit arising from such transactions in the open market or reasonably accurate adjustments can be made to eliminate the material effect of such differences. Since the respondent has a policy of charging a higher rate of depreciation as compared to the companies selected by the TPO, there is a definite impact on the net margins of the respondent as compared to the comparable companies. Thus, there is a need for making an adjustment to eliminate the differences in the accounting policies of the appellant and the comparable companies, in terms of the above Rules, especially given that in the bench marked international transaction is the sales by a captive service provider to its associated enterprises, on which depreciation would have no bearing and thus can be excluded altogether.

8. The Tribunal, by placing reliance on the Hyderabad Bench of the Tribunal in the case of MARKET RESEARCH TOOLS PVT. LTD. has held that the Dispute Resolution Panel erred in directing to exclude depreciation from the cost of tax payer as well as comparables. The aforesaid finding cannot be said to be perverse warranting interference of the Court in this appeal.

> 9. In view of preceding analysis, the third substantial question of law is answered against the revenue and in favour of the assessee."

17.6 Respectfully following the above decisions, we direct the AO/TPO to adopt the Cash PLI. Theses grounds are allowed.

18. As regards risk adjustment vide **grounds No.11(ii) & 17(ii)**, the assessee made submissions for allowing risk adjustment which was not accepted by the lower authorities. The ld. AR submitted that the assessee provides services on cost plus model. Under cost plus model, assessee would never incur a loss. Since all the costs are subsumed, while computing the billing / revenue, the assessee is assured of profits. The risk profiles of comparable companies differ from that of the assessee as they undertake business risks, financial risks, credit and collection risks, etc. In such circumstances, it is necessary to give effect to functional and risk differences while determining ALP. Without these adjustments, the comparability analysis done by the TPO remains incomplete. Reliance was placed on the decision of Capco Technologies Private Ltd v DCIT IT(TP)A No 204/Bang/2021 and it was prayed that the risk adjustment should be provided.

18.1 The ld. DR supported the orders of lower authorities and he submitted that the ld. DRP has rightly rejected the claim of the assessee.

18.2 After hearing both the parties, we note that in the recent judgement in *Capco Technologies India P. Ltd. in IT(TP)A*

No.204/Bang/2021 dated 18.11.2021 relied by the ld. AR, it has been held as under:-

> "28. The last issue which was argued before us is with regard to not granting risk adjustment. The submissions made in this regard were that Rule 10B(3) of the IT Rules provides that an adjustment ought to be provided for any differences in the economic factors between the tested party and the comparables. A risk adjustment is one such adjustment which is to be applied in order to adjust for the differences between the risk undertaken by the tested party vis-a-vis the comparable companies. Being a low risk service provider, the Assessee is devoid of any significant risks relating to its business operations whereas the comparable companies operate under uncontrolled conditions bearing risks, as a result of which the companies earn a risk premium which is not earned by a contract service provider like the assessee. Therefore, the profits of a contract service provider would be lesser than the companies selected as comparables, and in that view of the matter, it is humbly submitted that an adjustment to minimise the risk differential would be warranted. Reliance in this regard was placed on this Hon'ble Tribunal's decisions in Analog Devices India P. Ltd. v. DCIT [TS-816-ITAT-2016-Bang] and Intellinet Technologies India P. Ltd. v. /TO [TS-228-ITAT-2012(Bang)] where, in the cases of similar placed assessees, this Hon'ble Tribunal directed that a risk adjustment be granted. The Assessee has prayed for a direction to the TPO/AO to recompute the margins of the companies selected as comparables after taking into account the differences in the risks assumed by the Assessee and the said companies on the basis of the material that is and that may additionally be placed on record.
>
> 29. We find that the DRP has primarily rejected the plea of the Assessee in this regard on the ground that quantification of risk adjustment has not been given and in the absence of such quantification, the plea cannot be accepted. Besides the above, the DRP has also placed reliance on judicial pronouncements holding that risk adjustment cannot be allowed in the absence of proper and reliable computation of risk adjustment. We are in

> agreement with the conclusions of the DRP in this regard and find no grounds to interfere with its conclusions."

18.3 Respectfully following the above judgment, we remit this issue to the AO/TPO for fresh examination and direct the assessee to provide the details of quantification of risk adjustment in above terms.

19. **Ground No.11(iii)** is not argued by the assessee and dismissed as not pressed.

MARKETING SUPPORT SEGMENT (MSS)

19.1 By ground No.13, the assessee seeks inclusion of 3 companies viz., Spectrum Business Solutions Ltd., ICRA Management (India) P. Ltd. and Hindustan Fields Services P. Ltd., which were rejected by the lower authorities on the ground that the data was not available in the public domain.

19.2 The ld. AR submitted that Spectrum Business Solutions Ltd. is functionally similar to assessee and engaged in providing business support services and manpower services to its clients. Data is available in the public domain and this company passes all filters applied by the TPO.

19.3 Similarly, it was submitted that ICRA Management (India) P. Ltd. is also functionally similar and engaged in providing market research/analytics/ management consultancy/advisory services to its clients. Data is available in public domain and the company passes all the filters applied by the TPO.

19.4 Further, the ld AR submitted that Hindustan Fields Services P. Ltd. is engaged in providing sales and merchandising services across all channels and event co-ordination and merchandising services to its clients and functionally similar to assessee. The company passes all filters applied by the TPO. He also submitted that if upper turnover filter of Rs. 200 crores is applied, this company needs to be excluded.

19.5 The ld. DR relied on the orders of the lower authorities.

19.6 We have heard both the parties and perused the material on record. The assessee sought inclusion of the above company as a comparable in the MSS segment for computation of PLI. However, the ld. DRP has upheld the order of the ld. TPO by observing that it was not in the search matrix of the TPO. During the course of hearing the ld. AR produced the financial report and submitted that the financial data are available in the public domain and passes all the filters applied by the TPO. Therefore, this company can be considered as a comparable with the assessee company. Considering the rival submissions, the lower authorities have not examined the FAR analysis, therefore this issue is remitted back to the AO/TPO for FAR analysis and fresh decision in accordance with law.

20. Vide **ground No.14(iii)**, the assessee has sought exclusion of Ugam Solutions Pvt. Ltd., Majestic Research Services & Solutions Ltd., Scarecrow Communications Limited from the comparables which were retained by the lower authorities.

20.1 The ld. AR submitted that Ugam Solutions Pvt. Ltd. is functionally different as it provides managed analytics services and solutions combining its proprietary big data platform with a global team of insights and analytics experts. The Company operates in only one primary business segment of Management Analytics. Majestic Research Services & Solutions Ltd. is functionally different as it is independent Market Research Agency in India relying exhaustively on usage of technology for data acquisition. It provides qualitative and quantitative Research Services. The Company has abnormal and peculiar growth as its revenue increased by 102% during AY 2016-17. In subsequent years, the revenue of the Company has reduced dramatically to almost NIL. Scarecrow Communications Limited is functionally different as it is engaged in Advertising in press, television, radio etc. The ld. AR relied on the decision of this Tribunal in the case of *Epson India Pvt. Ltd. v. DCIT in IT(TP)A No.206/Bang/2021*.

20.2 The ld. DR relied on the orders of lower authorities.

20.3 We have heard both the parties and perused the material on record. With regard to Ugam Solutions Pvt. Ltd., we note that before the lower authorities the assessee has submitted that the company is engaged in various activities as contended in page 1130 & 1131 of PB and as per the annual report MGT-9 the NIC code is 7020 under the head 'Managed Analytics. However, the ld. TPO has included this company by observing that it passes all the filters. But the lower

authorities have not examined the issue in the light of submissions made by the assessee. Therefore, we remand this issue to the AO/TPO for fresh consideration.

20.4 Regarding Majestic Research Services & Solutions Ltd., on going through the order of the ld. TPO, this company was selected by the assessee and accepted by the TPO since it passes all the filters. Before the DRP that this company was requested to be excluded on the ground that it is functionally different, peculiar economic circumstances, exceptional year of operation and margin computation. Further we note from the TP documentation at pg. 394 of PB that this company has been selected by assessee itself with the following details:-

> "Majestic Research Services and Solutions Limited
>
> The company is engaged in providing market research services. In addition, the company offers various qualitative, quantitative and online market research and market tracking services. It is also engaged in planning, execution and proactive field management for multi-phased and multi-location projects."

20.5 As per the corporate information placed at pg. 2243 of PB, the company is engaged in providing market research services. The company offers a wide range of qualitative and quantitative research services which is in line with assessee's functions. As per revenue recognition placed at pg. 2244 of PB, the company's revenue is primarily derived from market research and related services. We are unable to understand once the above company passes all the filters

applied by the assessee and considered as comparable, but before the DRP and before us the assessee has sought for exclusion on the above note 3 points. The ld. DRP has dealt the issue in detail which is as under:-

> "2.9.11 Majestic Research Services & Solutions Limited
>
> - Functionally Different
> - Peculiar economic circumstances or exceptional year of operations
> - Margin Computation
>
> 2.9.11.1 Having considered the submissions, we note that the company provides business of rendering creative assistance work for advertisements through market research area is similar to that of assessee in in terms of AMP. As elaborated by the TPO, we note that all the activities carried by this company are only through market research and only the domain area is different. Accordingly we hold that this company is functionally comparable.
>
> 2.9.11.2 With regard to the peculiar economic circumstances, we are of the view that high profitability as such cannot be criteria for exclusion of companies, when it is found to be functionally comparable in terms of Rule 106 The Hon`ble ITAT Spl. Branch Mumbai in the case of Maersk Global Centres (India) Private Limited held that comparables with high profit margins cannot be discarded per se and it has to be examined whether the profit margin was on account of normal business conditions or not. Such a view was earlier taken by the Bangalore ITAT in the case of 2417 Customer.com Private Limited holding that high profit companies need not be excluded as the Indian TP regulations adopt the Arithmetic mean for determining the ALP.
>
> 2.9.11.3 Again in the case of Trilogy E-Business Software India Private Limited Vs. DCIT (2013) 29 taxmann.com 310 the Bangalore Tribunal held that there is no bar to considering companies with either abnormal profits or abnormal losses as comparable to tested parties as long as they are functionally

comparable, and it is lor the taxpayer to demonstrate the existence of any abnormal factors that would have caused the high profit margin. Similar views were taken in the case of Autodesk (India) Pvt. Ltd. vs. DCIT in ITA No.1108/Bang/2010 and Yodlee Infotech Pvt. Ltd. Vs. ITO (2013) 31 taxmann.com 230 (ITAT, BNG). In the case of ITO vs. Next Linx India Pvt. Ltd. TS-722-ITAT-2012-Bang-TP the Hon'ble ITAT Bangalore upheld the company with profit margin of 40% holding that in ITES sector this would not constitute extraordinary or super profits.

2.9.11.4 There are many decisions where the high profit margin companies have been upheld as comparables, The Hon'ble ITAT Bangalore in the case of Sap Labs (2010-111-44-ITAT-Bang-TP) upheld selection of comparable having margin of 40.96% (ADCC Research and Computing Centre Ltd.), 35.88% (Xcel Vision Technologies Ltd) and 30,86% (Zylog Systems Ltd), The ITAT, Hyderabad in the case of Deloitte Consulting Pvt, Ltd. confirmed selection of Vishal Information Technology Ltd having margin of 48.84%. The ITAT, Mumbai in the case of Mis. BP India Services Private Limited (ITA No,4425/Mum/2010) did not reject companies having margin of 75.6% (Datamatics Technologies Limited) and 68.7% (Hinduja TMT Ltd), and in the case of Exxon Mobil, upheld selection of Alpha Geo India Ltd having margin of 47 79% and Vimta Lab having margin of 57,68%.The Hon'ble Delhi High Court (TS173-HC-2015(Delhi)-TP1), in its verdict in the case of Chryscapital Investment Advisors (India) Private Limited (the appellant), emphasised functional analysis as the key comparability criterion. and inter al a held that: mere earning of high profits/ losses could not be a reason to exclude a company as a comparable.

2.9.11.5 In view of the above, we do not find merit in the plea for exclusion of this comparable on the ground of its high profit margin. The assessee also objected to margin computation error. In this regard, we direct the AO/TPO to verify and recomputed the margin."

20.6 We do not find any infirmity in the order of the ld. DRP. Therefore this company is to be retained as a comparable in the list of comparables. However, the ld. DRP has directed the AO/TPO for error in computation of margin of this company which we uphold.

20.7 With regard to Scarecrow Communications Limited, we note from the financial statement under significant accounting policy – overview of the company, that this company is to create advertising that a lasting shelf life. The team works towards creating communication that permeate popular culture. Easily enthused by new ideas, technology and fresh thoughts. The functions of this company are different from the marketing support service rendered by the assessee. Pages 2295 to 2304 of PB-I gives the details of revenue generated by this comparable. On pursual of pg. 2302 of PB, the revenue from operations is from retainership fee, shoot production receipt and service receipt & other fees. Therefore, this company is excluded from final list. Accordingly this comparable is directed to be excluded from the final list.

21. Regarding Ground No.15, the ld. AR submitted that the lower authorities have erred in incorrectly computing the operating profit margins of the following comparables and furnished the correct margins given below:-

SL No	Companies	TPO Margins	Correct margins	Reference
1	Quadrant Communications Ltd	-0.34%	-12.09%	Submission at **Pg 1125 of PB I** and Detailed Margin Computation at **Pg 2044 & 2045 of PB I.**
2	Pressman Advertising Ltd	12.99%	11.54%	Submission at **Pg 1129 of PB I** and Detailed Margin Computation at **Pg 2305 & 2307 of PB I.**
3	Ugam Solutions Private Limited	17.75%	12.97%	Submission at **Pg 1132 of PB I** and Detailed Margin Computation at **Pg 2305 & 2308 of PB I.**
4	Killick Agencies & Mktg. Ltd	20.99%	16.28%	Submission at **Pg 1138 of PB I** and Detailed Margin Computation at **Pg 2044 & 2052 of PB I.**

21.1 We direct the AO/TPO to verify the correct margins of the comparables while computing the operating margin used for determining the ALP. Assessee is directed to furnish the relevant details before the authorities.

22. **Ground No.16** of MSS segment has already been adjudicated along with ground No.10 above in the SWD segment. So also, ground **No.17 (ii)** in the MSS segment has been adjudicated along with ground 11(ii) above in the SWD segment.

23. **Ground No.18** is regarding notional interest on trade receivables. The TPO observed that the assessee had not charged interest to its AEs in respect of unrealised amounts and made an adjustment of Rs. 2,53,25,332/- by computing arm's length interest rate at 4.985% under CUP method and charged the notional interest on trade receivables. However, the DRP directed the TPO to recompute the interest adjustment by adopting SBI short term deposit interest rate after granting 30 days credit period and to restrict the interest till 31.03.2017. Thereafter, incorporating the directions of the DRP, the TPO in its OGE recomputed interest adjustment at Rs. 16,548,223/- and the same was considered in the final assessment order.

23.1 In this regard, the ld. AR submits that there can be no separate international transaction of `interest' in the international transaction of `provision of service'. Early or late realization of sale proceeds is only incidental to the transaction of sale, but not a separate transaction in itself. Further, TNMM has been adopted at segmental level to benchmark the transaction of Software development & Marketing support services, in which process the receivables were considered as closely linked transaction and hence were subsumed and accordingly already considered. Reliance was placed on the following decisions:

- Kusum Health Care Pvt. Ltd (TS-412-HC-2017(DEL)-TP) (Para 11 of Pg 2562 of PB-II)
- Millipore (India) Ltd [2017] 80 taxmann.com 12 (Bengaluru – Trib)
- Avnet India (P.) Ltd [2016] 65 taxmann.com 187 (Bangalore - Trib.)

- Lotus Labs Pvt Ltd [TS-865-ITAT-2016(Bang)-TP] and
- Cummins India Ltd. v Addl CIT [2015] 53 taxmann.com 53 (Pune - Trib.).

23.2 Without prejudice to above, the ld. AR submits that LIBOR without basis points should be adopted as a basis for benchmarking. The receivables due from the various AEs are denominated in USD. In support the above contention, the Assessee relies on the following decisions:

- Techbooks International P Ltd v DCIT (2015) 63 taxmann.com 114 (Delhi Trib) (Para 13.13 of Pg 2557 of PB II)
- Indegene Lifesystems (P.) Ltd. [2017] 85 taxmann.com 60 (Bangalore – Trib).
- Tata Autocomp Systems Ltd. [2012] 21 taxmann.com 6 (Mum.)

23.3 Without prejudice to above, it was submitted that credit period of nine months for realizing export proceeds from AE outside India should be considered for making adjustment towards interest on receivables. Reliance is placed on FEMA Regulations (page 1181-1182 of PB-I) which provides for 9 months for realisation of dues. In the alternative, average days of receivables of final comparables should be adopted as the credit period. The calculation is attached as Annexure 1 to the Synopsis filed by the ld. AR for the assessee.

23.4 The ld. DR relied on the orders of lower authorities and he further submitted that various Hon'ble High Courts and the Tribunal have held that notional interest on receivable beyond the credit period is to be considered as an international transaction. Therefore, the

argument of the ld. AR of the assessee is baseless. He submitted that the order of the lower authorities should be upheld.

23.5 We have heard both the parties and perused the material on record. After considering the order of the lower authorities, we are of the view that the notional interest on receivable is an international transaction, therefore this argument of the assessee is rejected. The TPO has applied 6 months LIBOR + 300 basis points whereas the ld. DRP has directed for applying SBI fixed deposit rate. During the course of hearing, it was brought to the notice of both the parties that while calculating the notional interest on receivables, 6 months LIBOR + 300 basis points beyond the credit period shall be considered by the TPO for giving effect on this issue.

24. **Ground No.19** relates to corporate tax adjustment towards depreciation on goodwill. AMD Research & Development Centre India Pvt Ltd (Transferee Company) had acquired M/s AMD India Private Limited (Transferor Company). The scheme of amalgamation was approved by the Hon'ble High Court of Karnataka on 24.04.2017 and the appointed date was 01.04.2015. The purchase consideration for such acquisition was Rs.24,01,01,11,194/-. As per the books, the value of net asset taken over was at Rs. 1,00,08,49,898/- of the Transferor Company. Therefore, the difference between the two was considered as goodwill and depreciation on same was accordingly claimed.

24.1 In the Draft assessment order, the AO has incorporated disallowance of depreciation on goodwill amounting to Rs.

35,00,40,324/- by placing reliance on the sixth proviso to section 32(1)(ii) of the Act. The DRP upheld that the Order of the AO observing that claim is not in accordance with the provisions contained in Explanation 7 to section 43(1) read with Explanation 2 to section 43(6)(c) of the Act read with sixth proviso to section 32(1) of the Act. This addition was incorporated in the final assessment order.

24.2 In this regard, the ld. AR submits that goodwill qualifies to be an intangible asset under Explanation 3 to section 32(1)(ii) of the Act. In the instant case, goodwill has arisen on account of amalgamation in the books of the Appellant and did not pre-exist. Further the Appellant, who acquired Goodwill becomes the owner, which has been generated as a result of years of reputation, which has been reflected in the valuation of business. Therefore, Goodwill acquired on amalgamation qualifies as an intangible, having been used for the purpose of business, the prerequisites for availing depreciation are satisfied. In support of the above contention, reliance was placed on the following decisions:

- Smifs Securities Ltd. (2012) 348 ITR 302 (SC)-Pg 2607 to 2608 of PB II
- Mylan Laboratories Ltd in ITA No. 2335/Hyd/2018 & ITA No. 12/Hyd/2019- Pg 2639 to 2642 of PB II
- Foodworld Supermarket vs DCIT, Circle-3(1)(1), Bangalore ITA Nos.2071, 2072, 2074 & 2075/Bang/2017- Pg 2658 of PB II
- Padmini Products (P.) Ltd vs DCIT, Circle 12(2), Bangalore [2020] 121 taxmann.com 237 (Karnataka)

24.3 The ld. AR also relied on the decision of the Coordinate bench in the case of *M/s. Altimetrik India Pvt.Ltd vs DCIT, Circle 1(1)(1), Bangalore (IT(TP)A No. 2511/Bang/2019) (Pg 2730 of PB-II)* where it was held that the depreciation claimed by the assessee on goodwill acquired deserves to be allowed in accordance with law and the learned AO was directed to compute the depreciation.

24.4 The Appellant further submits that the Regional Director, Ministry of Corporate Affairs, South-East Region, Hyderabad represented by Registrar of Companies had filed a joint affidavit dated 28th October 2016 before the Hon'ble NCLT, stating that it had issued notice dated 16.08.2016 to the Income-tax department giving 15 days time to offer comments/objections if any. In response to the said notice the DCIT, Circle – 1(1), Bengaluru vide letter in F.No. AMD India Private Limited/DCIT-C-1(1)(1)/2016-17 dated 26th September 2016 had raised the sole issue in relation to TDS/TCS credit. No other objection was raised.

24.5 It was submitted that all the facts related to the Amalgamation were provided to the AO at the time of Amalgamation itself. If AO had any objections, same should have provided at the time, when opportunity was provided to him. But once the consent has been provided by the AO, it cannot be objected unless there has been concealment or misrepresentation of facts, which are absent in the present case. In this regard, the ld. AR relied on the decision of *DCIT*

Circle 4(1)(1) vs. Urmin Marketing (P.) Ltd [2020] 122 taxmann.com 40 (Ahmedabad - Trib.).

24.6 With respect to objections raised by the AO on valuation of goodwill, it is submitted as follows:

Objections by the AO	Response of the Appellant
1. Scope of amalgamation was nothing but consolidation of group companies to take tax advantages.	The objectives of amalgamation have been extensively listed in para 2.3 of Preamble of the scheme. **(submissions at Pg 2332-2333 of PB-I).**
2. Consideration is in form of exchange of shares which is mere restructuring to reduce taxes.	Consideration can be in any form whether monetary or not. The law laid down in section 47(vii) also mandates issue of shares in lieu of purchase consideration to avail the benefit of non-taxable transfer **(Submissions at Pg 2333 of PB-I).**
3. The shares valued at Rs.240 crores (apprx) have been issued to a company whose net assets have been valued at Rs.140 crores (apprx) and fair value of fixed assets at Rs.25.14 crores. The method of valuation of the shares by discounting cash flow ('DCF') has been doubted by the AO.	The Appellant submits that purchase consideration based on book values cannot be adopted as its purely historical values. The company is taken over on going concern basis and DCF method is more appropriate. The Appellant has justified all the 3 components of DCF, namely cash flows. discounting factor and terminal value. In fact, actual sales are greater than estimated profits. This method is also listed in the Technical Guide on Valuation by the ICAI (**submissions at Pg 2334- 2336 & 2347-2366 of PB-I).**
4. Valuation was solely based on information given by management.	The Valuer is an independent entity and free to consider the reliability and creditability of the information provided to him. He is free to make

	necessary modifications if required. Therefore, it is incorrect to say valuation is solely based on management's information **(Refer submissions at Pg 2340 of PB-I).**
5. There is no justification in lieu of brand name to claim such high goodwill.	The Appellant submits that valuation of goodwill was not based on brand name of the company but various other factors (**Refer submissions at Pg 2341 of PB-I).**
6. The valuation report does not separately delve upon the components of goodwill. The goodwill valuation is not justified separately.	The Appellant submits that goodwill arising on amalgamation is anticipation of future income. The goodwill has been recognized as per the AS-14 issued by ICAI (**Refer submissions at Pg 2342-2343 of PB-I)**

24.7 Further, with respect to DCF method of valuation of shares, the Appellant submits that there are three important inputs necessary (detailed valuation of shares is given at **Pg 2344-2346 of PB-I).** These are detailed below:

- *Step 1: Cash Flow Projections*- The cash flows should reflect the best estimates of the management after taking into account various factors affecting the business. In the given case, the actual revenue of the Appellant are far more than the projected estimates used to determine the value (**Refer submissions at Pg 2336-2337 & 2367-2368 of PB-I).**

- *Step 2: Discount Rate*- This rate is aggregate of risk-free rate and risk premium. The valuer has adopted 13.5%, which is similar to discount rate of 13% provided by EY cost of capital survey (**Refer submissions at Pg 2337- 2338 & 2369 of PB-I).**

- *Step 3: Terminal Value*- Terminal value is determined by dividing the perpetuity cash flows with the discount rate as reduced by the stable growth rate, which is generally the inflation rate to reflect the value of the cash flows arising after the forecast period. The valuer has adopted 3% as terminal value

which is reasonable when compared to growth rate of that period and lower than India's inflation rate (**Refer submissions at Pg 2338-2339 of PB-I).**

24.8 Based on all of the above, the Appellant submits that there is no manipulation in share valuation as per DCF method. In case, the AO was dissatisfied, he had all the liberty to seek for information by issuing notice u/s 133(6) of the Act. The valuation adopted is fair and reasonable and cannot be questioned. Same basis of valuation is adopted for amalgamating and resulting company.

24.9 Therefore, the ld. AR submits that claim of depreciation on goodwill arising on account of amalgamation is in accordance with law and addition should be deleted.

30. On the other hand, the ld. DR submitted that this issue has been discussed by both the Assessing officer as well as DRP that depreciation on goodwill comes into existence only subsequent to the merger/acquisition/amalgamation and it is very important that the existing provisions of the Income tax Act are also considered which are in the statute specifically to deal with various situations emerging out of merger/acquisition/amalgamation. In this regard, the various provisions of the Income Tax Act are presented in a tabular form as under:-

Sl	Particulars	Provision in brief
1	Depreciation	'Written down value of the block of assets' shall have the same meaning as in section 43(6)(c) [Explanation 2 to Section 32(1)] **Restrictions** on depreciation in the hands of amalgamating company and amalgamated company in the previous year to the depreciation calculated on 'actual cost' of capital asset in the hands of amalgamating company prior to amalgamation [5th proviso to Section 32(1)]
2	Cost/Written down value of capital assets in the hand of companies	Actual cost of capital assets in the hands of amalgamated company to be **same** as in the hands of amalgamating company [Explanation 7 to Section 43(1)]
		'Written down value' of capital assets in the hands of amalgamated company to be **same** as in the hands of amalgamating company [Explanation 2(b) to Section 43 (6) (c)]
3	Cost of stock-in-trade	'Cost' of stock-in-trade in the hands of amalgamated company to be taken the **same** as in the hands of amalgamating company held either as capital asset or stock-in-trade [43C(1)]
4	Exemption in the hands of company	Exemption of capital gains in the hands of amalgamating company on transfer of capital asset of amalgamating company in the scheme of amalgamation [Section 47(vi)]
5	Exemption in the hands of shareholders	Exemption of capital gains in the hands of shareholders of amalgamating company on transfer of shares of amalgamating company in the scheme of amalgamation [47 (vii)]
6	Cost in the hand of owner/shareholders	Cost of capital assets to be the same as in the hands of previous owner where capital assets became the assets of the successor as a result of transfer under section 47(vi) rws [Section 49(1)(iii)(e)]
		Cost of shares of amalgamated company in the hands of shareholders, received as consideration for transfer of shares of amalgamating company,

30.1 The ld. DR submitted that a bare reading of all the above provisions makes it abundantly clear that it was always the intention of the Legislature to make amalgamation a tax neutral scheme for companies as well as for the shareholders and not to provide an opportunity to anyone to make it a tool to avoid the legitimate tax which it is otherwise is expected to pay. The legislature has taken pain to cover all possibilities as is evident with the number of sections which have been enacted to deal with amalgamation. According to the ld. DR, these are special provisions of the Act dealing with amalgamation and therefore, must get precedence over a general provision.

30.2 The ld. DR submitted that provisions of section 32 of the Act requires allowing depreciation to the amalgamated company in the same manner which would have been allowed to the amalgamating company in the event had there not been any amalgamation. It is clear from the proviso to section 32 which is as under:-

> "shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place"

30.3 The above proviso once again emphasizes the fact that amalgamation was always meant to be a tax neutral exercise.

30.4 The ld. DR further submitted that Explanation 7 to section 43(1) makes it very clear that the actual cost of the transferred capital asset must be the same in the hands of the amalgamated company. To make

it further clear it goes on to say that cost should be the same as it would have been if the amalgamating company had continued to hold the capital asset for the purposes of its own business. According to him, in the instant case, had amalgamation not taken place there was no possibility of claiming any depreciation on goodwill. The Amalgamating company could not have claimed a higher depreciation as this was a non-existent asset before amalgamation.

30.5 He submitted that to wriggle out of this situation, an argument has been made by the assessee that this section is not applicable because goodwill was not in the balance sheet of the amalgamating company. Goodwill came into existence because of amalgamation and therefore, it was never transferred from amalgamating company to an amalgamated company. He contended that this argument of the assessee militates against the intention of the legislature and hence, must be rejected. To bring out inherent flaw in this argument of the assessee, the ld. DR illustrated the cases where goodwill exists and does not exist, prior to amalgamation as under:-

Sl No	Goodwill in Amalgamating Company	Goodwill in Amalgamated company
Case 1	1 crore	1 crore
Case 2	zero	100 ore

30.6 It was submitted that if an amalgamating company has goodwill of Rs 1 crore and the purchaser company has paid Rs 100 crore which

is more than the value of the company, then post amalgamation its value will continue to be Rs 1 crore in the hands of the amalgamated company. But if there is no goodwill asset in the hands of an amalgamating company or in other words, the value of goodwill is 'zero' pre-amalgamation and the purchaser company has paid Rs 100 crore (more than the value of the company), then to interpret that this excess amount of Rs 100 crore can be termed as goodwill and depreciation can be claimed by the amalgamated company would not be logical and will give absurd result.

30.7 The ld. DR also referred to Explanation 2 to section 43(6)(*c*) of the Act which reads as under:

> (6) "written down value" means—
>
> ** ** **
>
> [Explanation 2.—Where in any previous year, any block of assets is transferred,—
>
> (a)** ** **
>
> (b) by the amalgamating company to the amalgamated company in a scheme of amalgamation, and the amalgamated company is an Indian company, then, notwithstanding anything contained in clause (1), the actual cost of the block of assets in the case of the transferee-company or the amalgamated company, as the case may be, shall be the written down value of the block of assets as in the case of the transferor-company or the amalgamating company for the immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year.]".

30.8 He submitted that as per the above provisions, the WDV of the assets acquired in the scheme of amalgamation in the hands of the amalgamated company will continue to be the same as it would have been in the hands of the amalgamating company, had there been no amalgamation. Hence the argument of the assessee that this section is not applicable because goodwill was not in the balance sheet of the amalgamating company, and since goodwill was never the part of WDV of the amalgamating company, it came into existence only post amalgamation has to be rejected. He submitted that the DRP has rightly held that the assessee claim of depreciation on goodwill is not in accordance with the mandatory provisions contained in Explanation 7 to section 43(1) r.w. Explanation 2 to section 43(6)(c) r.w. sixth proviso to section 32(1) of the Act and upheld the addition.

30.9 The ld. DR submitted that divergent views exists in the decisions of the courts and Tribunals in respect of this issue and the submissions are furnished in the tabular form as below:-

Depreciation on goodwill arising out of merger should be allowed

Name of the case	Tribunal/ Court	Decision	Remarks
A.P. Paper Mills Ltd. [2010] 128 TTJ 596	ITAT, Hyderabad	The goodwill is a business or commercial right of similar nature and the assessee is benefited by amalga-mation by acquiring that commercial value being intangible assets which the assessee has paid on amalgamation. The	1. It was a case related to 263. ITAT held that the provision of s. 263 could be invoked by the CIT if the circumstances specified therein viz., (1) the order is erroneous (2) by virtue of the order being erroneous, Prejudice has been

		excess consideration over and above the excess of assets over liabilities is the goodwill which is an asset entitled to depreciation under section 32 of the IT Act. As such, the AO is justified in granting depreciation on goodwill while completing the assessment under section 143(3) of the IT Act and the CIT is not justified in invoking of provisions of section 263 on this issue.	caused to the interest of the Revenue, that cannot be said erroneous so far as prejudicial to interest of the Revenue. 2. There is no discussion in the order about the various provisions of the Income Tax Act such as 5th provision to section 32(1), section 49(1)(iii)(e), Explanation 7 to section 43(1) and /or Explanation 2(b) to section 43(6)(c_ and section 55(2)(a)(ii).
Truine Energy Services (P) Ltd vs DyCIT [2016] 65 taxmann.com 288/237 taxmann 230	Delhi High Court	In the case of it was held that consideration paid by assessee in excess of its value of tangible assets was rightly classified as goodwill. In the facts of the present case, the Tribunal has rejected the view that the slump sale agreement was a colourable device. Once having held so, the agreement between the parties must be accepted in its totality. The agreement itself does not provide for splitting up of the intangibles into separate components. Indisputably, the transaction in question	1. The honorable HC relied heavily on the fact that theTribunal has rejected the view that the slump sale agreement was a colorable device. In the instant case, the valuation is being doubted by both the Assessing officer as well as DRP 2. Relied on Smifs Securities Ltd to hold that The issue whether depreciation is allowable on goodwill is no longer res integra. 3. There is no discussion in the order about the various provisions of the Income Tax Act such as 5th provision to section

		is a slump sale which does not contemplate separate values to be ascribed to various assets (tangible and intangible) that constitute the business undertaking, which is sold and purchased. The agreement itself indicates that slump sale included sale of goodwill and the balance sheet specifically recorded goodwill at Rs. 40.58 crore. Goodwill includes a host of intangible assets, which a person acquires, on acquiring a business as a going concern and valuing the same at the excess consideration paid over and above the value of net tangible assets is an acceptable accounting practice. Thus, a further exercise to value the goodwill is not warranted. [Para 20]	32(1), section 49(1)(iii)(e), Explanation 7 to section 43(1)and/or Explanation 2(b) to section 43(6)(c) and section 55(2)(a)(ii).
Altimetrik India (P) Ltd vs DCIT 137 taxmann.com 9	ITAT Bangalore	Consideration paid by amalgamated company over and above net assets of amalgamating company should be considered as goodwill arising on amalgamation and goodwill arising on amalgamation is a	1. There is no discussion in the order about the various provisions of the Income Tax Act such as 5th provision to section 32(1), section 49(1)(iii)(e), Explanation 7 to section 43(1) and/or Explanation 2(b) to section 43(6)(c) and section 55(2)(a)(ii).

		capital asset eligible for depreciation.	2. Reliance was placed on AricentTechnologies (Holdings) Ltd [2019] 109 taxmann.com 47 (Delhi-Trib). 3. Amalgamation has to be tax neutral.
Padmini Products (P) Ltd	Karnataka High court	Where under aschemeof succession intangible assets of a partnership firm were transferred to assessee-company in lieu of shares issued to partners of erstwhile firm, successor assessee-company was entitled to claim depreciation on such intangible assets on cost incurred by it with reference to such intangible assets.	1. Assessee and erstwhile partnership firm were different entities and there was transfer of intangible assets by partnership to assessee for a valuable consideration that was by way of allotment of shares. 2. The honorable high court was conscious of the fact that the transaction was between different entities and valuation of the intangible assets has not been questioned or genuineness of the transactions has been doubted. 3. In the instant case, the transaction is between related parties and valuation has been questioned both by Assessing Officer as well as DRP.
Zydus Wellness Ltd [2016] 76 taxmann. Com 328	ITAT Ahmedabad	Depreciation on goodwill arising on amalgamation claimed by assessee-company during course of assessment proceedings	1. The issue before the Tribunal was whether Depreciation on goodwill arising on amalgamation can be claimed during course of assessment

		vide a revised computation of income without filing revised return of income was allowable.	proceedings vide a revised computation of income without filing revised return.
GujaratHigh Court in [2019] 112 taxmann.com 400 and also	Gujarat HC	It was upheld by honorable Gujarat High Court in [2019] 112 taxmann.com 400 and also by	2. Reliance was placed on Smifs Securities Ltd to hold that depreciation on goodwill is allowable. Even Gujarat HC and SC upheld the same relying on the same.
SC in [2020] 113 taxmann.com 154	Supreme Court	honorable SC in [2020] 113 taxmann.com 154	3. There is no discussion in the order about the various provisions of the Income Tax Act such as 5th provision to section 32(1), section 49(1)(iii)(e), Explanation 7 to section 43(1) and/or Explanation 2(b) to section 43(6)(c) and section 55(2)(a)(ii).
Areva T & D India Ltd [2012] 20 taxmann.com 29 (Delhi)	HIGH COURT OF DELHI	Specified intangible assets, viz., business claims, business information, business records, contracts, employees and know-how acquired by assessee under slump sale agreement are in nature of 'business or commercial rights of similar nature' specified in section 32(1)(ii) and are accordingly eligible for depreciation under that section.	1. Reliance was placed on Techno Shares & Stock Ltd. v. CIT [2010] 327 ITR 323/ 193 Taxman 248 (SC) and CIT v. Hindustan Coca Cola Beverages (P.) Ltd. [2011] 331 ITR 192/ 198 Taxman 104/ 9 taxmann.com 104 (Delhi)) 2. Entire argument was focused on Sec 32(1)(ii) 3. There is no discussion in the order about the various provisions of the Income

			Tax Act such as 5th provision to section 32(1), section 49(1)(iii)(e), Explanation 7 to section 43(1) and/or Explanation 2(b) to section 43(6)(c) and section 55(2)(a)(ii).
Aditya Birla Nuvo Ltd. [2017] 79 taxmann.com 210 (Bombay)	HIGH COURT OF BOMBAY	The impugned order of the Tribunal allowed the respondent-assessee's appeal on this issue of depreciation on goodwill by following the decision of the Apex Court in CIT v. Smifs Securities Ltd. [2012] 348 ITR 302 / 210 Taxman 428 / 24 taxmann.com 222. In the above view, question no.(i) as proposed does not give rise to any substantial question of law Thus, not entertained.	Reliance was placed on Smifs Securities Ltd to hold that depreciation on goodwill is allowable. Even Gujarat HC and SC upheld the same relying on the same. 2. There is no discussion in the order about the various provisions of the Income Tax Act such as 5th provision to section 32(1), section 49(1)(iii)(e), Explanation 7 to section 43(1) and/or Explanation 2(b) to section 43(6)(c) and section 55(2)(a)(ii).
[2019] 112 taxmann.com 217 (Ahmedabad - Trib.) Bodal Chemicals Ltd.	IN THE ITAT AHMEDABAD BENCH 'A'	[2019] 112 taxmann. com 217 (Ahmedabad - Trib.)/[2020] 180 IT... INCOME TAX: Where pursuant to Scheme of amalgamation, assessee claimed depreciation on Goodwill representing higher amount paid to transferor company as compared to its net assets, in view of fact that relevant year was second year of	1. Kind attention is drawn to para 10 to 12 of the judgement. They agreed that the intent of the Legislature was to make amalgamation a tax neutral scheme for companies as well as for the shareholders and not to provide a tax planning mechanism to either of them. They further mention that there was no entry in the

		amalgamation whereas assessee's claim for depreciation had been allowed in first year of amalgamation, following principle of consistency, assessee's claim was to be allowed in assessment year in question as well	books of the transferor company for the intangible assets/goodwill being self generated assets. They state that we are of the view that impugned transaction for claiming the deduction on account of the depreciation is an Arrangement for claiming the higher depreciation which is unwanted under the provisions of law. After discussing all this, They allow the claim stating that it is the second year of claim & the assessee was allowed depreciation in respect of such goodwill in the 1st year of amalgamation i.e. AY 2006-07. There was no action either under section 263 or 147 of the Act by the revenue. Therefore we can safely presume that the claim of the depreciation of the assessee in the 1st year has attained finality. Admittedly the 1st year is the base assessment year from where the issue of depreciation is emanating. 2. In this case, this is the first year of claim of depreciation and the transaction is between related parties and valuation has been

			questioned both by Assessing Officer as well as DRP.
[2020] 122 taxmann.com 40 (Ahmedabad - Trib.) Urmin Marketing (P.) Ltd.	IN THE ITAT AHMEDABAD BENCH 'D'	Where assessee got amalgamated with a company 'UPPL' and paid purchase consideration to shareholder of said company, resulting in excess payment of 4.86 billion over net book value of assets and liabilities acquired by it and treated said excess payment as goodwill, since in view of decision of Supreme Court in case of CIT v. Smifs Securities Ltd. [2012] 24 taxmann. com 222/210 Taxman 428/348 ITR 302, goodwill is a part and parcel of intangible assets, assessee was eligiblefor depreciation on goodwill Accordingly, the AO was of the view that such intangible asset in form of goodwill emerging in books of resulting company (amalgamated company) was on account of valuation of business and revaluation of assets & liabilities which was not available in the books of account of amalgamating company. As such	1. Arguments made in para 3 as well as other paras of this submission may kindly be considered.

		neither resulting company nor amalgamating company incurred any cost in acquiring such intangible assets. Therefore, under the provisions of section 32 of the Act there is no allowance of depreciation available for any asset created in the books of account due to valuation and revaluation of assets and liabilities. Moreover, the amalgamation is not a transaction of purchase and sale of shares/ assets/liabilities but to join hands together for the business expediencies.	
[2020] 113 taxmann.com 6 (Hyderabad-Trib.) Mylan Laboratories Ltd.	ITAT HYDERABAD	Where assessee amalgamated with a company by way of acquisition/purchase, consideration paid in excess of net value of assets and liabilities of amalgamating company was to be treated as goodwill and; assessee was to be allowed depreciation on such goodwill acquired on amalgamation.	1. The Tribunal relied on Smifs Securities Ltd. , AP Paper Mills Ltd. (ITAT Hyd) Delhi High Court in the case of Areva T & D India Ltd. & Delhi High Court in the case of Tribune Energy Services (P.) Ltd. 2.All these cases has already been discussed in this table and various submissions.

Depreciation on goodwill arising out of merger should not be allowed

Name of the case	Tribunal/ Court	Decision
Chowgule & Co (P) Ltd [2011] 10 taxmann.com 224 (Panaji)	ITAT Panaji	Assessee, post amalgamation, had claimed to have acquired goodwill of 'MPL' on payment of a sum and, accordingly claimed depreciation on such goodwill. Revenue disallowed claim of depreciation. The ITAT held that on appointed date 'MPL' did not have any asset and property as goodwill or such intangible asset in its accounts which could become a subject matter of transfer or vesting of asset to assessee. It further stated that while giving direction for amalgamation, High Court was not shown to have ordered to pay any specific amount for such goodwill, it could not be accepted that assessee incurred any additional cost on account of goodwill. Therefore, claim made by assessee with regard to goodwill, which was only a fictitious asset in hands of assessee, and also claim of depreciation were neither bona fide nor tenable. ITAT Panaji held that 'goodwill' arising pursuant to the scheme of amalgamation is not eligible for depreciation by placing reliance on Explanation 7 to section 43 (1) of the IT Act.
United Breweries Ltd.	ITAT Bangalore	ITAT Bangalore restricted amalgamated company's claim of depreciation in the year of amalgamation on goodwill arising on amalgamation applying 5th proviso to section 32(1) of the IT Act and held that the amalgamated company cannot claim depreciation on assets acquired under amalgamation more than the depreciation allowable to amalgamating company.
Toyo Engineering India Limited. [2013] 33 taxmann.com 560 (Mumbai)	ITAT Mumbai	If the assessee had paid more than the fair market value of assets minus the fair market value of liabilities, then the company would have a case to claim that certain amounts were incurred for goodwill. In the absence of such an exercise, there was no goodwill in the nature of commercial rights purchase by the assessee. This was only a book entry and it was only another way of disclosing the intrinsic value of the fixed asset of the company. The very purchase of goodwill was not

		proved by the assessee. Therefore, no depreciation could be allowed on goodwill.

30.10 The ld. DR further reiterated that from various provisions of the Income Tax Act, it is very clear that **amalgamation was meant to be a tax neutral proposition.** Entire anomaly has arisen because of the decision of the Hon'ble Supreme Court in the case of ***Smifs Securities Ltd.***, wherein it was held that ''goodwill' is an intangible asset eligible for depreciation under the provisions of section 32 of the IT Act. The relevant paragraphs are reproduced below:-

> "Explanation 3 to section 32(1) states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading of the words 'any other business or commercial rights of similar nature ' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial rights of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3 (b). (Para 4)
>
> In view of the above, it is opined that 'Goodwill' is an asset under Explanation 3(b) to section 32(1). (Para 5)
>
> ·One more aspect needs to be highlighted. In the present case, the Assessing Officer, as a matter of fact, came to the conclusion that no amount was actually paid on account of goodwill. This is a factual finding. The Commissioner (Appeals) has come to the conclusion that the assessee had filed copies of the orders of the High Court ordering amalgamation of the above two companies; that the assets and liabilities of 'Y' Ltd. were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-company stood increased. This finding has

> also been upheld by Tribunal. There is no reason to interfere with the factual finding. (Para 6)
>
> One more aspect which needs to be mentioned is that, against the decision of Tribunal, the revenue had preferred an appeal to the High Court in which it had raised only the question as to whether goodwill is an asset under section 32. In the circumstances, before the High Court, the revenue did not file an appeal on the finding of fact referred to hereinabove. (Para 7)
>
> In view of the above, it has to be held that goodwill is an asset within the meaning of section 32 and depreciation on 'goodwill' is allowable under the said section. (Para 8)"

30.11 The ld. DR submitted that in decision of *Smifs Securities (supra)*, the Hon'ble Supreme Court mentioned that the Revenue has not filed any objection to the finding of CIT(A) and ITAT that the difference between the cost of an asset and the amount paid constituted goodwill. Only point raised by the Revenue was that whether goodwill is a capital asset. **Therefore, the Hon'ble Court has not deliberated upon this crucial issue and hence, decided only the limited issue, whether goodwill is a capital asset eligible for depreciation.** The decision in *Smifs Securities* was without considering the provisions which were relevant to the issue in hand and given the fact that these were not argued before the court, it could not be extended on the points which were not argued or evaluated at all.

30.12 Another aspect in Smifs Securities judgment (supra) was that the taxpayer acquired capital right in the form of existing clientele, *i.e.*, 'goodwill ' which was noted as a finding of fact and was not appealed by the revenue before the High Court and the only issue for

consideration was whether goodwill is an asset within the meaning of Section 32 of the Income Tax Act, which the court answered in affirmative. It is a settled position that a case is an authority, for what it decides, and not for what logically follows from it. Reference may be made to the following:-

> A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to logically follow from it. Such a mode of reasoning assumes that the law is necessarily a logical code, *whereas every lawyer must acknowledge that the law is not always logical at all.*

30.13 This decision of House of Lords was quoted with approval by the Constitution Bench of Supreme Court in the case of ***Sudhansu Sekhar Misra and Others*** wherein it stated that a decision is only an authority for what it actually decides.

> Hence, the said case can be said to be an authority only to the extent that goodwill is a depreciable asset.

30.14 Even though the Supreme Court in the case of ***Smifs Securities*** has decided that goodwill is depreciable asset, one may note that the contention before the court was not as to whether difference arising out of amalgamation was goodwill, eligible for depreciation. The Supreme Court on an earlier occasion has held that an issue which gets implicitly decided without it being raised is an inadvertent error on the part of the Court. Reference in this regard may be made to the following observations,

> "It would be straining logic to an absurd limit to say that, though this contention was not raised, not argued, not discussed and not

> decided, yet it must be held to have been implicitly decided because, through an inadvertent error committed by this Court, an answer was given in favour of the Revenue in ignorance of the true position."

30.15 The ld. DR submitted that the issue of depreciation on goodwill reached Hon'ble Supreme Court in another case, namely, Zydus Wellness Ltd [2020] 113 taxmann.com 154 where the exact wordings of the order was as under:-

> "Learned Additional Solicitor General submitted that the issues involved in the present matter are completely covered by the decision of this Court in Commissioner of Income Tax, Kolkata v. SMIFS Securities Limited, (2012) 13 SCC 488."

30.16 Once again there was no discussion on the crucial issue that the difference between the cost of an asset and the amount paid constituted goodwill. In this case the issue was whether depreciation on goodwill arising out of amalgamation can be claimed before the Assessing Office without filing a revised return of income. The ITAT held that it can be done by holding as under:-

> "Depreciation on goodwill arising on amalgamation claimed by assessee-company during course of assessment proceedings vide a revised computation of income without filing revised return of income was allowable."

30.17 In this decision it was held that depreciation on goodwill will be allowable in view of the decision of the Hon'ble Supreme Court in Smifs Securities Ltd.

Relevance and significance of accounting principles

30.18 The ld. DR submitted that it is a well-accepted proposition that for the purposes of ascertaining profits and gains the ordinary principles of commercial accounting should be applied, *so long as they do not conflict with any express provision of the relevant statute.* The said principle was again retreated by the Supreme Court in the case of ***Woodward Governor*** {**[2009] 179 Taxman 326 (SC)/[2009] 312 ITR 254 (SC)}** wherein it held that profits for income-tax purpose are to be computed in accordance with ordinary principles of commercial accounting, *unless such principles stand superseded or modified by legislative enactments*. The relevant portion of the aforesaid judgement is as under:

> "As profits for income-tax purpose are to be computed in accordance with ordinary principles of commercial accounting, unless such principles stand superseded or modified by legislative enactments, unrealized profits in the shape of appreciated value of goods remaining unsold at the end of the accounting year and carried over to the following year's account in a continuing business are not brought to the charge as a matter of practice, though loss due to fall in the price below cost is allowed even though such loss has not been realized actually. The said system of commercial accounting can be superseded or modified by legislative enactment. Under section 145(2), the Central Government is empowered to notify from time-to-time the Accounting Standards to be followed by any class of the assessees or in respect of any class of income. Accordingly, under section 209 of the Companies Act, mercantile system of accounting has been made mandatory for companies. In other words, Accounting Standard, which is continuously adopted by an assessee, can be superseded or modified by legislative intervention. However, but for such intervention or in cases falling under section 145(3), the method of accounting undertaken by the assessee continuously is supreme. In the instant case, there was no finding given by the Assessing Officer

> on the correctness or completeness of the accounts of the assessee. Equally, there was no finding given by the Assessing Officer stating that the assessee had not complied with the Accounting Standards."
>
> (emphasis supplied)

30.19 In other words, it can be said that accounting treatment of any transaction is relevant only to the extent they are not in conflict with the express provisions of the IT Act. In case of merger and acquisition, the IT Act expressly requires recording of capital assets at the price appearing in the books of target company. Accordingly, the ld. DR submitted that the recognition of goodwill in accordance with Accounting Standard-14 and amortisation of the same in accordance with Accounting Standard-26 may not be of any help in claiming depreciation under the IT Act in view of the express provisions mentioned therein.

Harmonious and purposive Construction

30.20 The ld. DR submitted that it is also elementary that the provisions of the law are to be so read as to make them workable rather than redundant. If depreciation is allowed on goodwill generated, because of amalgamation on standalone basis and in disjunction with the proviso 5 to section 32(1), the provision of explanation 7 to section 43(1) and explanation 2(*b*) to section 43(6)(*c*) of the Act as well as various other provisions of the Act mentioned in the above paragraphs, these provisions of the Act will be rendered *otiose,* as observed by

Hon'ble Supreme Court, in the case of *CIT* v. *Hindustan Bulk Carriers* [2003] 126 Taxman 321/259 ITR 449/179 CTR 362 as follows:-

> "A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in maxim ut res magis valeat quam pereat i.e., a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties."

30.21 While elaborating upon the need for harmonious construction of the statutory provisions, the oft-quoted treatise Justice GP Singh on the Principles of Statutory Interpretation (14th paperback edition @ page 159)', has these words of advice:

> " …….. It has already been seen that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the courts to avoid "a head-on clash" between two sections of the same Act and, "whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise" ……
>
> In the words of GAJENDRAGADKAR, J., "The sub-sections must be read as parts of an integral whole and as being interdependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy".
>
> As stated by VENKATARAMA AIYAR, J., "The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is what is known as the rule of harmonious

> construction". That, the effect should be given to both, is the very essence of the rule. Thus, a construction that reduces one of the provisions to a "useless lumber" or "dead letter" "is not harmonious construction. To harmonise is not to destroy. ……

30.22 The ld. DR also cited case laws dealing with interpretation of statutes which must be kept in mind while deciding the issue at hand which are as under:-

- M.H. Daryani [1993] 202 ITR 731 (Bom)
- International Airport Authority of India [2001] 119 Taxman 702 (Delhi)
- Hotel & Allied Trades (P) Ltd. [2002] 83 ITD 85 (Cochin)
- Jhabarmal Agarwalla [1992] 65 Taxman 176 (Gauhati)
- C.K. Choksi & Co. [2003] 127 Taxman 109.

30.23 In view of the above, the ld. DR submitted that a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section. It is now trite that where two interpretations are possible, that which fulfils the purpose and object of the Act should be preferred. In this regard, he relied on the decisions of *Cape Brandy Syndicate v. IRC [(1921) 1 KB 64]* and *Calcutta Guj. Education Society v. Calcutta Municipal Corporation [2003] 10 SCC 533*.

30.24 The ld. DR further submitted that in the present case the assessee was not entitled for depreciation on the impugned goodwill in pursuance to the proviso 5 to section 32(1) which restricts depreciation on the assets amalgamated to the extent it was available to the amalgamating company. Similarly, the provision of explanation 7 to

section 43(1) and explanation 2(b) to section 43(6)(c) of the Act mandate that actual cost and WDV of assets transferred in scheme of amalgamation should be equal to what was in the books of amalgamating company. As there was no goodwill available in the books of amalgamating company prior to amalgamation, accordingly no depreciation allowances is available to the assessee post amalgamation.

30.25 If an asset emerges in the books of amalgamated company which was not existing in the books of amalgamating company, such an asset emerges only due to revaluation of assets & liabilities for which amalgamated company does not incur any cost. Hence, as per the provision of section 55(2)(a)(ii) of the Act value of assets which has been acquired without incurring any cost should be taken at NIL. Similarly, there would not be any possibility for allowing the deduction for the assets resulting on account of revaluation of assets. Therefore, the AO held that the assessee has not incurred cost in order to acquire goodwill and also such goodwill was not transferred from amalgamating company. Therefore, the value of the same for the purpose of taxation is NIL. Thus, depreciation on goodwill is not allowable in the year under consideration.

General vs Special Provisions

30.26 The ld. DR also submitted that a combined reading of the various provisions reveals that the intention of the legislature behind the introduction of the amalgamation scheme was to achieve tax

neutrality. Besides the above, the intention of the legislature is reflecting from the following provisions:-

- There is no capital gain in the hands of the amalgamating company on the transfer of capital assets in the scheme of amalgamation under the provisions of section 47(vi) of the Act.
- The cost of stock-in -trade in the hands of amalgamated company shall remain the same as in the hands of amalgamating company either as capital asset or stock in trade as provided under section 43C of the Act.
- Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc under the provisions of section 72A of the Act.
- Exemption of capital gains in the hands of shareholders of amalgamating company on transfer of shares of amalgamating company in the scheme of amalgamation under the provisions of section 47 (vii) of the Act.
- Cost of capital assets to be the same as in the hands of previous owner where capital assets became the assets of the successor as a result of transfer under section 47(vi) r.w.s. 49(1)(iii)(e) of the Act.
- Cost of shares of amalgamated company in the hands of shareholders, received as consideration for transfer of shares of amalgamating company, to be same as the cost of shares of amalgamating company under section 49(2) of the Act.

30.27 Therefore, according to the ld.DR, the above provisions in the Income Tax Act which are dealing with the specific case of amalgamation can be termed as Special Provisions whereas the depreciation on goodwill which can be held as a general provision of the Act. The depreciation on goodwill was never on the statute but came into existence because of the decision of the Supreme Court in the case of ***Smifs Securities Ltd.***

30.28 It is trite to say that the general law's ambit is restricted to that of the special law in a way that **general law does not have power over a special law**. Generalia specialibus non derogant is a Latin maxim which is applied when there is a conflict between general and special statutes. It is a maxim used for statutory interpretation. Generalia stands from general and Specialibus stands for special. Thus, when interpreted, it means that general laws do not prevail over special laws or, the general does not detract from specifics. The ld. DR submitted that the Hon'ble Supreme Court has clearly stated in SUPREME COURT REPORTS [2014] 3 S.C.R.1 INTERPRETATION OF STATUTES; that general law yields to special law should they operate in the same field on same subject.

30.29 It is the argument of the assessee that the Assessing Officer was given a time of 15 days to offer comments / objections if any. All the facts related to the Amalgamation were provided to the AO at the time of Amalgamation itself and any objection should have provided at the time, when opportunity was provided to him. Once the consent has been provided by the AA, it cannot be objected unless there has been concealment or misrepresentation of facts, which are absent in the present case. In this regard, the ld. DR submitted that No objection being filed by the Assessing officer only implies that there was no objection to the scheme of amalgamation. Tax implications of the said amalgamation will be examined by the Assessing Officer only at the time of scrutiny. This is a right as well as duty of the Assessing Officer which flows directly from the statute itself and this right cannot

be taken away in any manner. 15 days is too less a time to make any meaningful study of the scheme of amalgamation. Therefore, the AO is not prevented in examining the tax implications of the scheme of amalgamation. Same argument holds when the assessee argued that the scheme has been approved by the Hon'ble High Court and the approval of the scheme of amalgamation must be limited to that extent as such.

30.30 The ld. DR submitted that the cash flow projections of the assessee is estimated projection which may or may not happen eventually. It is based on various factors which admittedly are the best estimates of the management after taking into account various factors affecting the business. During the course of hearing, it was submitted that there are increase in revenue as well, in the succeeding years. The fact remains that it is based on an estimate by the management and its reliability has been questioned by the Assessing officer as well. Further, looking into the financials of both the companies involved in amalgamation for the last 5 years, then also there would have been increase in the revenue. Therefore, to say that increase in revenue was because of the amalgamation cannot be a logical conclusion. In the scheme of amalgamation between the related parties, there are lot of grey areas. The assessee can prepare a report according to which it can give shares in the ratio of 1:1 or 1: 2 or 1:3 or any other ratio as it deems fit. The fact of the matter is that a tool is being handed over in the hands of the assessee by which related parties can agree to amalgamation at an agreed price and then, claim depreciation on the goodwill emanating on account of amalgamation. Thus, scheme of

amalgamation is being misused as a tax avoidance tool. It is humbly prayed to consider all these aspects while considering the decision of the Hon'ble Supreme Court.

30.31 The ld. DR submitted that the amendments to section 2(11), 32(1), 50 & 55 by the Finance Bill, 2021 were effective from AY 2021-22 as per which goodwill will not be a depreciable asset, These amendments goes to the root of the matter to address the anomaly because of the decision of the Hon'ble Supreme Court in *Smifs Securities (supra)* and contended that when goodwill itself doesn't remain a depreciable asset, then, obviously, goodwill arising out of amalgamation will not be a depreciable asset as well as submitted earlier above and the amendment does not address these arguments. Therefore, he submitted that depreciation cannot be claimed on goodwill arising out of amalgamation under the existing provisions of the Act.

31. In the rejoinder, the ld. AR submitted that the ld. DR has cited 5th proviso to section 32(1), Explanation 7 to section 43(1) and Explanation 2 to section 43(6)(c) of the Act and contends that in the scheme of amalgamation, the WDV of the amalgamated company will continue to be the same as it would have been in the hands of amalgamating company, had there been no amalgamation. In this regard, the ld. AR submits that the above provisions are applicable when an existing and recorded asset is transferred by the amalgamated company to the amalgamating company. In the instant case, Goodwill

arose in the hands of the Appellant for the first time on account of the amalgamation. The Appellant has paid for and hence, economically suffered in acquiring the goodwill. The scheme of amalgamation which has been approved by the National Company Law Tribunal ("NCLT") itself clearly provides that aggregate excess of consideration (discharged in form of issue of shares) over and above the net asset value of the amalgamating companies shall be recognized as goodwill. This aspect has also been stated even in the NCLT order (Page 901 and 903 of PB-I).

31.1 As per the NCLT Order, objections were invited from the Income Tax department against the scheme of amalgamation. In response, the Income Tax department raised objection on the sole issue of TDS/TCS. The AO had not raised any objections in the impugned scheme of amalgamation at the time when opportunity was provided to him, all details about scheme of amalgamation and treatment of goodwill was before him. Therefore, the Department implicitly accepted that depreciation is admissible on the goodwill. Thus, Department cannot now turn around and state that depreciation is not admissible on the goodwill.

31.2 The contentions raised by the learned DR have been raised before the Tribunal and High Court many times and always, the Tribunal and High Court have rejected this contention. The judicial view on these arguments is long settled in favour of the assessee. These cases are discussed below.

31.3 After elaborately discussing the relevant provisions, the Tribunal in the case of *Aricent Technologies (Holdings) Ltd. [2019] 109 taxmann.com 47 (Delhi - Trib.).* held that the consideration paid by the amalgamated company over and above the net assets of the amalgamating company should be considered as goodwill arising on amalgamation and the depreciation claimed by the assessee on goodwill acquired deserves to be allowed in accordance with law.

31.4 The Delhi ITAT has elaborately discussed sections 32(1)(ii), fifth proviso to section 32(1), Explanation 2 to section 43(6)(c) and Explanation 7 to section 43(1). The ITAT observed that the literal reading of these sections lay down that the written down value of the intangible block of asset is zero in the books of the amalgamating companies, the actual cost would remain zero in the hand of amalgamated company. This interpretation of the relevant provisions is applicable only to existing and recorded assets. The ITAT has held such understanding is correct for the simple reason that by virtue of the scheme of the amalgamation the assessee paid consideration over and above the net asset value of the amalgamating companies and therefore, the difference has been rightly taken as the cost of acquisition of goodwill.

31.5 The above decision was relied upon by Bangalore ITAT in the case of M/s. Altimetrik India Pvt. Ltd vs DCIT, Circle 1(1)(1), Bangalore (IT(TP)A No. 2511/Bang/2019). Similarly, the Jurisdictional High Court in the case of **Padmini Products (P.) Ltd vs**

DCIT, Circle 12(2), Bangalore [2020] 121 taxmann.com 237 (Karnataka) has held that "it is evident that 5th proviso to section 32 of the Act restricts aggregate deduction both by the predecessor and the successor and if in a particular year there is no aggregate deduction, the 5th proviso does not apply. Thus, it is axiomatic that until and unless it is the case of aggregate deduction, the proviso has no role to play." The fifth proviso to section 32 of the Act comes into play only when there are existing assets. In the instant case, goodwill is arising out of amalgamation, therefore, it is outside the purview of 5th proviso and hence, the contention of the DR is without basis.

31.6 The Hyderabad Tribunal in the case of *Mylan Laboratories Ltd in ITA No. 2335/Hyd/2018 & ITA No. 12/Hyd/2019* rejected the contention of learned DR about the applicability of fifth proviso to section 32 of the Act for disallowing depreciation on goodwill. The tribunal discussed the decision of Hon'ble Supreme Court in case of *Smifs Securities [2012] 24 taxmann.com 222/210 Taxman 428* and observed that the Apex Court has considered the circumstances under which the goodwill has arisen on which depreciation was claimed. Relying on the judgement of Smifs Securities Ltd., the Tribunal allowed the depreciation claimed on goodwill.

31.7 Based on the above, it was submitted that the interpretation of the relevant provisions by the learned DR is not correct. In the instant case, the goodwill on which depreciation is claimed is arising out of the amalgamation. As per Scheme approved by NCLT, various

intangibles like licences, registrations, copyrights, patents, trade names, trademarks, other rights, domain/website, all staff, workmen, trained employees, documentation, information, computer programs, manual data, catalogs, quotation, sales advertising material, list of present and former customers, suppliers, customer pricing information, and other records etc are transferred. These intangibles are collectively reflected as goodwill. The assessee has economically suffered in acquiring the goodwill and has paid consideration (discharged in form of issue of shares) over and above the net asset value of the amalgamating companies and same is recognized as goodwill as per order of NCLT.

31.8 The ld. AR submitted that the contention of the ld. DR that there is no discussion about various provisions dealing with amalgamation in judicial precedents relied upon by the assessee is factually incorrect. In most of these cases (for e.g. A P Paper Mills Ltd (2010) 128 TTJ 596; Truine Energy v DCIT 65 taxmann.com 288 (Delhi HC); Zydus Welness Ltd 76 taxmann.com 328; etc), the learned DR has not even relied on the provisions of section 32(1)(ii), fifth proviso to section 32(1), Explanation 2 to section 43(6)(c) and Explanation 7 to section 43(1) to support his arguments. The question of Tribunal, therefore referring to these sections does not arise. Further, in the case of Altimetrik India Pvt. Ltd vs DCIT (supra) & Padmini Products (P.) Ltd (supra), the orders clearly discuss the above provisions. Even otherwise, in the decisions in the case of Aricent Technologies (supra), Mylan (supra), Altimetrik India Pvt. Ltd vs DCIT (supra) & Padmini

Products (P.) Ltd (supra) cited by the assessee, after discussing the above sections, the Tribunal has allowed depreciation on goodwill. These decisions are conveniently ignored by the learned DR.

31.9 The ld. AR further submitted that valuation of tangible assets taken over was carried out by Mr. H. Krishna Murthy, an approved valuer for Income Tax Department. Further, the purchase consideration as "2 equity shares of Rs.10/- each fully paid of AMD R&D (Transferee) for every 1 share of AMD IPL (Transferor) was determined on the basis of "fair share exchange ratio"." M/s SSPA & Co, Chartered Accountants were appointed for valuation of equity shares. The valuation was performed using Discounted Cash Flow Method ('DCF') and all the 3 components of DCF, namely cash flows, discounting factor and terminal value were justified. The computation of DCF is explained in detail at **pages 2336 to 2346 of PB I.** These valuations are blessed by NCLT while accepting the exchange ratio.

31.10 Further, the valuation reports of assets and equity shares were made available for scrutiny. The DCF computation is on record. The learned DR as well as the lower authorities have not pointed out single mistake with the figures or valuation. The argument that valuation is not correct due to related party is without any basis. The basis of valuation of both amalgamating and amalgamated company is same. The valuation is approved by NCLT and reflects future earning potential of the company. **The actual future turnover and profits are more than that adopted for valuation**, which reflects that valuation is

in fact done on conservative basis. Thus, the arguments of learned DR for rejecting the reliance placed on various case laws is without basis and bad in law.

31.11 The ld. AR submits that submits that the judicial precedents relied by the learned DR are distinguishable on the following points and are not applicable to the present case: -

SL No:	**Name of the Case**	**Point of differences**
1.	**Chowgule & Co. (P.) Ltd v ACIT Circle -2, Margao [2011] 10 taxmann.com 224 (Panaji)**	a) In this case, the assessee had written off an amount of Rs. 4605.90 lakhs as Exceptional "goodwill" arising out of amalgamation written off in its audited profit and loss account whereas in the instant case, excess consideration was recorded as goodwill as mentioned in the order of NCLT. b) In this case, the amalgamating company has substantial losses in its books (which was carried forward and set off post amalgamation) and the business was carried on with intermittent stoppages. Therefore, there could not be any goodwill attached to the business whereas in the instant case, the amalgamating company had no losses in its books, but had substantial reserves. c) Further, this decision is before SC decision in the case of Smifs Securities.
2	**DCIT vs Toyo Engineering India Ltd [2013] 33 taxmann.com 560 (Mumbai- Trib.)**	a) The remarks of DR itself state that purchase of goodwill was not proved and it was only a book entry. b) In this case, the assets and liabilities have not been valued and the

		consideration was in the form of cancellation of investments. Whereas in the Appellant's case, business, Fixed Assets & liabilities of the transferor company were taken over at the fair market value as per the valuation.
3	**United Breweries Ltd vs Add CIT, Range-12, Bangalore [2016] 76 taxmann.com 103 (Bangalore - Trib.)**	a) In this case, there was a merger with its Wholly owned Subsidiary, whereas in the case of the Appellant, it is amalgamation by purchase. b) In this case, the transferor company had goodwill in its books prior to merger, whereas in the present case, the Appellant is the transferee company who did not have any goodwill in the books prior to amalgamation. c) Reliance on United Breweries case for disallowance of depreciation on goodwill has been rejected by Tribunal in the case of ***Mylan (supra) and Altimetrik India Pvt. Ltd vs DCIT (supra).***

31.12 In the case of Smifs Securities (supra), the Revenue itself accepted the finding of the Tribunal that difference between cost of asset and amount paid constituted goodwill and the assessee company in the process of amalgamation had acquired a capital right in the form of goodwill. The learned DR has also accepted this in page 19 of the DR Submission. Having accepted this aspect, the question of valuation was not there before Supreme Court. However, that does not mean that the ratio of SC decision is not binding. The decision having been rendered on the similar facts as in the case of Appellant, is a binding precedent and has to be followed.

31.13 The ld. AR referred to the contention of the ld. DR that profits for income tax purpose are to be computed in accordance with ordinary principles of commercial accounting unless such principles stand superseded or modified by legislative enactments and submitted that there was no provision in the Act which conflicts with mandate of AS-14. As explained in AS-14 issued by Institute of Chartered Accountants of India, amalgamation can be, (a) in the nature of merger; and (b) in the nature of purchase. In the second type of amalgamation by purchase, the consideration paid in excess of the net value of assets and liabilities of the amalgamating company is to be treated as goodwill. In the books, the Appellant has rightly followed accounting treatment prescribed by the AS. The Appellant has recorded consideration paid in excess of net assets taken over as goodwill. The Appellant has given due regard to accounting standards for the preparation of books of accounts and tax computation. The Appellant has followed the mandate of section 145 of the Act.

31.14 Further, the learned DR has made reference to another rule of interpretation "Generalia specialibus non derogant" which means general laws do not prevail over special laws. According to the learned DR, there are special provisions in the Act such as sections 47(vi), 43C, 72A, 47(vii), 49(1) and 49(2) of the Act which need to be given priority over the general provisions dealing with depreciation of goodwill. In this regard, the ld. AR submitted that the argument of learned DR is self-conflicting. It is not clear on what basis the learned DR is contending that section 32 dealing with depreciation is a general

provision. Section 32 is a specific provision dealing with depreciation and as contented by learned DR, it should be given precedence over other general provisions. The sections cited by learned DR deal with various issues such as exemption of capital gains, cost of stock-in-trade, provisions relating to carry forward and set off of loss, cost of shares on amalgamate company. These sections have no relevance to the present case.

31.15 The learned DR has contended that the assessee submitted the cash flow projections, which is estimated projections, and which may or may not happen eventually. In this regard, the ld. AR submitted that it has already demonstrated that the actual performance is much better than the estimated performance, which in fact was on a conservative side (**page 2337 of PB I**).

31.16 The ld. AR submitted that according to the revenue, the amendments made by Finance Act, 2021, prohibits depreciation on goodwill. He submitted that these amendments are applicable from AY 2021-22 onwards and have no relevance for the assessment year under consideration. Further, if goodwill was not eligible for depreciation, the question of reducing depreciation from the purchase price of goodwill would not arise. Thus, amendment by Finance Act, 2021 support the view that prior to AY 21-22, goodwill was eligible for depreciation.

31.17 In view of the above submissions, it is prayed that the depreciation on goodwill as claimed by the assessee is to be allowed.

32. After hearing both the sides, perusing the entire material on record and the orders of the lower authorities, we note that, goodwill has arisen because of amalgamation scheme. The ld. AR submitted that assessee has recorded goodwill in the books of accounts on the difference between the net assets (total assets – liabilities) taken over by the assessee and consideration paid to the amalgamating company. The assessee claimed depreciation on the goodwill treating it as intangible asset. The AO and DRP did not accept the claim of depreciation on goodwill. During the course of hearing on different dates, both the parties argued extensively and filed written synopsis which are stated hereinabove. In the written submissions filed by the assessee, it is stated that the goodwill has arisen for the excess consideration paid and it has been recorded as per the scheme approved by the Hon'ble High Court. We further note from the rejoinder dated 26.12.2022 filed by the ld. AR that at para No.13, it is stated as under:-

> "As per Scheme approved by NCLT, various intangibles like licences, registrations, copyrights, patents, trade names, trademarks, other rights, domain/website, all staff, workmen, trained employees, documentation, information, computer programs, manual data, catalogs, quotation, sales advertising material, list of present and former customers, suppliers, customer pricing information, and other records etc are transferred. These intangibles are collectively reflected as goodwill. "

32.1 We note that the assessee has stated that goodwill is recorded in the books of accounts on the difference between the net assets (total

assets – liabilities) taken over by the assessee and consideration paid to the amalgamating company on the one hand, and on the other, it is stated that the intangibles are collectively reflected as goodwill. This aspect requires verification at the end of the AO. We also note that no separate value has been assigned to these intangibles as per para 13 of the rejoinder extracted above. It is also not clear whether the amalgamating company has claimed revenue expenditure or depreciation on these intangibles. We therefore remit this issue to the AO to verify the above aspects and also examine that no double benefit is given to the amalgamating/amalgamated company. Accordingly, the AO shall decide the issue afresh as per law, after giving proper opportunity of being heard to the assessee. This issue is allowed for statistical purposes.

33. **Ground No.20 :** The ld. AR submitted that the AO has not provided the credit of advance tax paid of Rs.9,56,00,000 relating to transferor company merged with the assessee in the computation of tax liability. We remit this issue to the Assessing Officer for verification and decision as per law.

33.1 Levy of interest u/s. 234B vide **ground No.23** is consequential in nature.

IT(TP)A No.262/Bang/2022

34. The assessee has raised the following grounds:-

"GENERAL GROUND

1. The Orders passed by learned Assistant Commissioner of Income Tax, Circle – 1(1)(1), Bangalore (hereinafter referred as "AO" for brevity), learned Deputy Commissioner of Income Tax (Transfer Pricing Officer) – 1(1)(1), Bangalore (hereinafter referred as "TPO" for brevity) and the Honourable DRP-1, Bengaluru ("AO", "TPO" and DRP collectively referred as "lower authorities" for brevity) are bad in law and liable to be quashed.

GROUNDS RELATING TO TRANSFER PRICING – LEGAL ISSUES

2. The learned AO has erred in making a reference for the determination of the Arm's Length Price of the international transactions to the TPO without demonstrating as to why it was necessary and expedient to do so.

3. The lower authorities have erred in passing the Order without demonstrating that the Appellant had any motive of tax evasion.

GROUNDS RELATING TO TP ADJUSTMENT IN SOFTWARE DEVELOPMENT SEGMENT

4. The learned AO has erred in making transfer pricing adjustment of Rs. 51,80,22,306/- towards international transactions in software development segment.

5. The lower authorities have erred in:

(i) modifying the segmental results of the Appellant and allocating all expenses on revenue basis. The Appellant submits that segmental as given in TP study report should be adopted;

(ii) Conducting a fresh TP analysis despite absence of any defects in the transfer pricing analysis submitted by the Appellant;

(iii) Adopting inappropriate filters like one sided turnover filter, 25% RPT filter, etc. in the process of selecting comparables and not adopting appropriate filters like onsite revenue filter, etc;

(iv) Selecting inappropriate comparables and selecting companies as comparables even though they are not comparable in terms of functions performed, assets utilized, risks assumed, size, one sided turnover, unusual business circumstances, high margin, etc. The lower income tax authorities have erred in adopting the following companies as comparables:

- Aptus Software Labs Private Limited
- Consilient Technologies Pvt. Ltd.
- Cybage Software Pvt. Ltd
- Cygnet Infotech Pvt. Ltd
- Infobeans Technologies Limited
- Infosys Ltd
- Larsen & Toubro Infotech Ltd
- Mindtree Ltd
- Nihilent Ltd
- OFS Technologies Limited
- Persistent Systems Ltd
- Tata Elxsi Ltd
- Threesixty Logica Testing Services Pvt. Ltd.

(v) Rejecting the following comparables selected/proposed by the Appellant for unjustified reasons:

- Akshay Software Technologies Limited
- Athena Global Technologies Limited
- Evoke Technologies Private Limited
- E-Zest Solutions Limited
- Nitor Infotech Private Limited
- Sasken Communication Technologies Limited
- Sankhya Infotech Limited

6. The learned AO/TPO has erred including M/s R Systems International Ltd. in the final list of the comparables despite directions of DRP to exclude it.

7. The lower authorities have erred in incorrectly computing the operating profit margin of following comparables:

- Harbinger Systems Pvt Ltd
- Inteq Software Limited

8. The lower authorities have erred in:

(i) Not adopting Cash PLI for computation of ALP;

(ii) Not recognizing that the Appellant was insulated from risks, as against comparables, which assume these risks and therefore have to be credited with a risk premium on this account.

GROUND RELATING TO NOTIONAL INTEREST ON TRADE RECEIVABLES

9. The lower authorities have erred in:

(i) Ignoring the business, commercial and industry realities and economic circumstances applicable to the Appellant;

(ii) Making adjustment for notional interest on extended payment terms given to AE without appreciating that there is no real income arising to the Appellant;

(iii) Not appreciating that the receivable from the AE is not an international transaction within the meaning of section 92B of the Act;

(iv) Not appreciating that the receivable from AE is not a separate transaction from the sale of goods or provision of services from which it is arising;

(v) Not appreciating that the Appellant had adopted TNMM at segmental level, in which process, the receivables were considered as closely linked transaction and hence were subsumed and accordingly already considered;

(vi) not adopting LIBOR as basis for determining arm's length interest rate;

(vii) adopting SBI short term deposit rate for AY 2017-18 for computing ALP;

(viii) Computing interest till the realisation of receivables and not restricting the computation for the financial year despite directions of DRP to restrict the interest adjustment up to the end of financial year and

(ix) not adopting reasonable credit period for computing ALP.

GROUND RELATING TO DISALLOWANCE OF DEPRECIATION ON GOODWILL

10. The learned DRP/AO have erred in

(i) Making addition of Rs. 26,25,30,243/- by disallowing the depreciation claimed on Goodwill;

(ii) Not appreciating that the difference between Purchase consideration and the value of net assets acquired constitute an intangible asset;

(iii) Not appreciating that Goodwill is a business asset and falls within the meaning of "other business or commercial right of similar nature" Explanation 3(b) to section 32 of the Act and is eligible for depreciation; and

(iv) Not following the binding judicial precedents of Hon'ble Supreme Court.

OTHER GROUND

11. The lower authorities have erred in levying interest of interest u/s 234B of Rs. 17,26,48,455/-. On the facts and circumstances of the case, interest u/s 234B of the Act is not leviable.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly."

35. For the AY 2017-18, The TPO vide order dated 26.01.2021 u/s 92CA of the Act proposed the following TP adjustments**:-**

Name of the Segment	**Segmental Revenue of Appellant**	**Average margin**	**TP Adjustment**
Software development segment	Rs.4,54,01,47,184/-	20 comparables with median of 26.18%.	Rs. 59,33,17,959/-
Notional Interest on Trade Receivables	-	Interest rate at 5.975% PA	Rs. 6,09,32,234/-
Total			**Rs. 65,42,50,193/-**

36. The AO passed the draft assessment order u/s. 144C(3) of the Act on 27.03.2021, incorporating the TP adjustment of Rs. 65,42,50,193/- as made by the TPO. Also, he made addition of Rs.26,25,30,243/- by disallowing the depreciation claimed on Goodwill arising out of merger. Aggrieved, the Appellant filed objections before DRP on 26.04.2021. Pursuant to the directions of the DRP, an order giving effect to DRP directions was passed by the TPO dated 22.02.2022 making total TP adjustment of Rs. 58,47,74,038/- as follows:-

Name of the Segment	**Average margin**	**TP Adjustment**
Software development segment	24 comparables with median of 24.33%	Rs. 51,80,22,306/-
Notional Interest on Trade Receivables	Interest rate at SBI short term rate	Rs. 6,67,51,732/-
Total		**Rs.58,47,74,038/-**

37. The AO passed the final assessment order u/s 143(3) r.w.s 144C(13) r.w.s 144B of the Act dated 28.02.2022 incorporating the TP adjustment as per TP OGE to DRP directions. Also, corporate tax addition of Rs.26,25,30,243/- towards disallowance of depreciation on goodwill was retained in final assessment order as confirmed by DRP. Aggrieved by the final assessment order, the assessee is in appeal before the Tribunal.

38. Grounds No.1 to 3 are not pressed, hence it is dismissed as not pressed. Ground No.4, 5 (i) & (ii) are general in nature.

39. Ground No.5(iii) regarding application of RPT filter. The ld. AR submitted that the TPO has applied 25% of sales as threshold limit and submitted that it should be 15% of RPT filter. This ground has been considered for the AY 2016-17 in ground No.7(iii) hereinabove and it is held that 15% RPT filter should be applied. It is held accordingly for AY 2017-18 also.

40. The next issue vide **ground No.5 (iv)** by the assessee is regarding exclusion of following companies :-

i. Aptus Software Labs Pvt. Ltd.
ii. Consilient Technologies Pvt. Ltd.
iii. Cybage Software Pvt. Ltd.
iv. Cygnet Infotech Pvt Ltd.
v. Infobeans Technologies Ltd.
vi. Infosys Ltd.
vii. Larsen & Toubro Ltd.
viii. Mindtree Ltd.
ix. Nihilent Ltd.
x. OFS Technologies Ltd.
xi. Persistent Systems Ltd.
xii. Tata Elxsi Ltd.
xiii. Threesixty Logica Testing Services Pvt. Ltd.

40.1 During the course of hearing, the ld. AR has not pressed the companies at Sl.No. (i), (iii), (ix) & (x), which are dismissed as not pressed. We now take up for consideration the following companies.

Consilient Technologies Pvt. Ltd.

40.2 The ld. AR submitted that the Company is functionally different as it provides licensable software products for speech, video, fax and analog modem communications market. Relevant extract of website and submissions are placed at Pg 966-969 of PB I. He relied on the decision of ITAT Hyderabad in the case of *Conexant Systems (P.) Ltd. v. DCIT [2018] 91 taxmann.com 308 for AY 11-12,* wherein Consilient Technologies Pvt Ltd is rejected on functionality basis and submitted that this company is to be excluded.

40.3 The ld. DR relied on the orders of lower authorities. He further submitted that the lower authorities have rightly examined this company's annual report and observed that this company is engaged in

software development services. The true picture can be obtained from the financial reports of the company. Therefore this company should not be removed from the list of comparables.

40.4 We have considered the rival submissions and perused the material on record. On going through the paperbook submitted by the assessee, we note that pg. no. 969 is a detailed submission before the lower authorities. At page 966-968, the assessee has given website information of the company regarding functional profile. But in the annual report as observed by the ld. DRP, it is a software development company and functionally comparable. At para 2.6.41.3, the ld. DRP has also observed that the company is engaged in product development and that auditor of the company has certified that the company is a service company primarily rendering software services. From the perusal of the submissions of the ld. AR it is stated that functional profile of this company is different and it provides licensable software products for speech, video, fax and analog modem communications market. We have gone through the judgment cited by the ld. AR in the case of *Conexant Systems (P). Ltd. (supra)*, we did not find any reference of this company. We remit this issue to the AO/TPO for fresh consideration

Threesixty Logica Testing Services Ltd

40.5 The ld. AR submitted that the Company has substantial RPT for FY 2016-17 (16.85%). Computation for RPT is placed at pg.951 of Pb.. He also submitted that the RPT should be 15% of the sales instead

of 25% of the sales. This would result in selection of better uncontrolled comparable transactions as envisaged in the Indian TP regulations. He also relied in the case of *Autodesk India P. Ltd. [2018] 96 taxmann.com 263 (Bang. Trib)* and other decisions quoted at pg. 868 & 869 of PB. Hence this company is to be rejected.

40.6 The ld. DR relied on the orders of lower authorities. He further submitted that the lower authorities have rightly taken the RPT filter @ 25%. We have considered the rival submissions and perused the material on record. From page 951 of PB, we note that the RPT filter computed by the assessee for AY 2014-15 is 16.85% which is more than 15% RPT filter as argued by the ld. AR . Since this issue for AY 2016-17 in ground No. 7(iii) is remitted back to the AO/TPO, following the same, we remit this issue to the AO/TPO with similar directions.

Cygnet Infotech Pvt Ltd.

40.7 The ld. AR submitted that the Company has substantial RPT for FY2016-17 (19.85%) & FY 2015-16 (17.49%). Computation of RPT for FY 2016-17 is placed on record. It is is functionally different as it is is engaged in the provision of various services such as enterprise solutions, Application, Content Management services and IT enabled services. Therefore this company has to be excluded.

40.8 The ld. DR relied on the orders of lower authorities.

40.9 We have considered the rival submissions and perused the material on record. The ld. AR has submitted that the company is functionally dissimilar and fails RPT filter. However, the ld. DRP held that this company is functionally comparable and in regard to RPT filter, it is within the range of 25%. We note that the coordinate Bench of the ITAT in the case of *Radisys India Ltd. for AY 2017-18 [2022] 145 taxmann.com 294 (Bangalore - Trib.)* decided the issue of functional comparability and held as under:-

"8.1 The two comparables that assessee seeks to exclude on functional dissimilarities are:

(*i*) Infobeans Technologies Ltd. and

(*ii*) Cygnet Infotech Pvt. Ltd.

(*iii*) ……..
…….

(*ii*) Cygnet Infotech Pvt. Ltd.

8.5 The Ld. A.R. submitted that this company is engaged in the business of providing Enterprise Solutions, Application Content Management Services and IT Enabled Services. This has been observed by the DRP also. The Ld.AR thus submitted that, the activities performed by this comparable is basically in the ITES segment, and therefore cannot be compared with the software development service provider. In support the Ld.AR relied on page 2033 of the paper book where the annual report of his company is placed.

8.6 On the contrary the Ld.DR relied on the order passed by the authorities below. We have perused the submissions by both sides in light of records placed before us.

8.7 In the annual report it is mentioned that this company derives revenue various services by providing Enterprise Solutions, Application content, Management services etc. It is also mentioned that the revenue recognition is by providing man power support to its customers. AT page 2033 of the paper book, we note that this company bares all the risks attributable to a full fledged entrepreneur. In our view this company cannot be considered as a good comparable.

Accordingly, this comparable is directed to be excluded."

40.10 Following the above decision of the coordinate Bench, we direct the AO/TPO to exclude this company from the list of comparables on functional dissimilarity, hence we are not adjudicating the issue of RPT filter of this company which is left open.

Infobeans Technologies Limited

40.11 The ld. AR submitted that this company is functionally different as it is engaged in providing diversified services in the areas of Custom Application Development, Content Management Systems, Enterprise Mobility, Big Data Analytics. It is not a pure software development company. Relevant submission and website extracts are at Pg 942-946 of PB I. He further submitted that the ITAT in following cases has held that Infobeans Technologies Ltd is into diversified software services and cannot be considered as a comparable to the Assessee.

- ADP Pvt. Ltd., Hyderabad vs DCIT-1(1), Hyderabad (TS-63-ITAT-2022 Hyd) for AY 2016-17
- M/s.Airlinq Technology Pvt. Ltd vs DCIT, Circle 3(1)(1) Bangalore IT(TP)A No.231/Bang/2021 for AY 2016-17

40.12 The ld. DR relied on the orders of lower authorities.

40.13 We have considered the rival submissions and perused the material on record. This company has been excluded in assessee's own case for AY 2016-17 hereinabove. We also note from the PB pg. 613 the company is engaged in diversified activities and there is no change in facts from the previous AY. It is engaged in the development of

platforms and technologies using custom scrips, AI technologies, robotic process automation, chatbox, integration tools and frameworks like jenkiins, Selelium, CAD, content management system (CMS), enterprises mobility and big data analytics, etc. Since there is no change in functional profile of this company for the present year, in view of this, the AO/TPO is directed to follow the decision for AY 2016-17.

Infosys Ltd

40.14 The ld. AR submitted that the company is functionally different as it is much larger company engaged in diversified activities and not a pure software development company. It has global brand image and owns intangible assets worth Rs.3,652 crores. There is vast difference between the profile of Infosys and the assessee company. The Company has substantial onsite revenue, thus, different business model compared to assessee. Reliance is placed on the following decisions:-

- M/s. Yahoo Software Development India Pvt. Ltd. vs JCIT, Special Range – 7, Bengaluru IT(TP)A No. 178/Bang/2022 for AY 2017-18
- ADP Pvt. Ltd., Hyderabad vs DCIT-1(1), Hyderabad for AY 2016-17 (TS-63-ITAT-2022 Hyd)

40.15 The ld. DR relied on the orders of lower authorities.

40.16 We have considered the rival submissions and perused the material on record. This company has been considered in assessee's own case for AY 2016-17 hereinabove. Since there is no change in

functional profile of this company for the present year, in view of this, the AO/TPO is directed to follow the decision for AY 2016-17.

Larsen & Toubro Infotech Ltd

40.17 The ld. AR submitted that this company is functionally different as it is engaged in diversified activities like infrastructure management services, digital consultation, data and analytics and is not a pure software development company. The services are provided under two segments, namely Services cluster and Industrial cluster. Software service segmental data is not available. The Company has substantial onsite operations for all 3 FY's. Thus, business model is different from Appellant. The Company has global brand value and has business spread across borders. GDA technologies Limited amalgamated with L&T in FY 2016-17. Reliance is placed on the following decisions:-

- ADP Pvt. Ltd., Hyderabad vs DCIT-1(1), Hyderabad for AY 2016-17 (TS-63-ITAT-2022 Hyd)

40.18 The ld. DR relied on the orders of lower authorities.

40.19 We have considered the rival submissions and perused the material on record. This company has been considered in assessee's own case for AY 2016-17 hereinabove. Since there is no change in functional profile of this company for the present year, in view of this, the AO/TPO is directed to follow the decision for AY 2016-17.

Mindtree Limited

40.20 The ld. AR submitted that The company is functionally different as it is engaged in IT consulting and implementation and segmental information is not available. The company has global brand and owns Intellectual Property and therefore, cannot be compared to captive service provider like Appellant. The Company has substantial onsite revenue. Thus, has different business model when compared to Appellant. The company, during the FY 2016-17 has entered into various high value acquisition and merger transaction. Such extraordinary events have an effect on the profitability. Hence this company has to be excluded. Reliance is placed on *M/s. Yahoo Software Development India Pvt. Ltd. vs JCIT, Special Range – 7, Bengaluru IT(TP)A No. 178/Bang/2022 for AY 2017-18*.

40.21 The ld. DR relied on the orders of lower authorities.

40.22 We have considered the rival submissions and perused the material on record. We note from the order of the DRP that this company is engaged in rendering of software development services in different verticals and comparable to assessee. The company is earning foreign currency from software development services of Rs.42.73 million. As per Note from the Annual Report, the principal business is software development services and 99% revenue is generated from the principal business activity. As per annual report at pg. 93 the different service activities in the form of consulting, maintenance, testing, management support services, etc. clearly fall within the gamut of software development services, though it pertains

to different verticals. The ld. AR of the assessee raised the issue regarding extra ordinary event regarding amalgamation which has been dealt by the ld. DRP at para No. 2.6.29.7 and before us the ld. AR of assessee was unable to demonstrate that how the amalgamation has affected the financial results of the company. The ld. DRP has discussed in detail from para 2.6.29.1 to 2.6.29.8. Considering the entire submissions, we hold that his company is functionally dissimilar following the decision of the coordinate Bench of the ITAT Hyderabad in the case of Infor (India) Pvt. Ltd. [2022] 143 taxmann.com 68 (Hyderabad - Trib.) wherein it is held as under:-

> **"15.** Comparable company Mindtree Ltd., is concerned, before the Ld. TPO, assessee raised objections for its inclusion in the list of comparables basing on functional dissimilarity, diversified activities, product company, lack of segmental information, significant onsite operations, presence of intangibles, significant research and development activities. Ld. TPO after going through the annual report, did not think it proper to accept the contentions of assessee and observed that it is self-evident that its entire revenue from operations is derived from software development services moreover, Mindtree Ltd., may be offering add on associated services which is integral to the core services of the software development, that does not vitiate the core operations which still remains software development itself and entire revenue from operations is derived from software development services, no need for segmental arise. Ld. TPO also referred the case of Capgemini of ITAT, Mumbai, wherein it was held that - the Sr. Counsel has also pointed out that the Infosys and Wipro have substantial revenue, 51.7% in case of Infosys, and 45.3% in case of Wipro from on-site work done overseas at the site of clients whereas the onsite work in the case of the assessee is just 5%. It has been pointed out that the employees if sent overseas have certain dead hours, which cannot be properly utilized as can be done in the home country. But, this argument as rightly

> pointed out by the Ld. CIT-DR does not support the case of higher margin in case of onsite work because dead hours would mean less output with the same employee cost, which would in fact reduce the margin. No material has also been placed before us to show that the margin in case of on-site work is higher. Basing on the same, Ld. TPO rejected Mindtree Ltd., as comparable. Ld. TPO also observed that the assessee has not stated as to how the approach of the assessee to the operating margin and that would there be a possibility of any comparables left, which are not controlled. It was also observed by the Ld. TPO that the assessee did not demonstrate as to how the R&D expenditure being incurred by this company is the reason for the higher profit margins, earned. Although the company may be incurring expenditure on R&D. It does not change the fact that the core business is SWD. Ld. DRP after going through the annual report, judicial precedents and considering the contentions of the assessee, observed that the company is engaged in international information technology consulting and implementation delivering business solutions through global software development and further observed that the company's earnings in foreign currency from software development services was Rs. 42.73 millions. As per the Note on Revenue Recognition, it has stated the principles adopted in recognizing revenue from software development services. Thus, it is evident that Mindtree Ltd., is engaged in software development services and functionally comparable to the assessee."

40.23 Having considered the findings of the Ld. TPO and Ld. DRP, now we look at the findings of the Tribunal in assessee's own case for the assessment years 2014-15, 2015-16 and 2016-17. In the assessment year 2014-15, the Tribunal considered the comparability of Infosys Limited, Larsen & Toubro Infotech Limited, Tata Elxsi Limited (seg), Persistent Systems Limited, Mindtree Ltd and E-Info Chips Pvt. Ltd and found that such entities are not at all good comparables to the assessee and directed the deletion of the same from the final list of comparables. So also in the assessment year 2015-16,

Infosys Limited, Larsen & Toubro Infotech Limited, Tata Elxsi Limited (seg), Persistent Systems Limited, Mindtree Ltd and Cybage Software Private Limited were considered and directed to be deleted. In the same way, for the assessment year 2016-17, the comparability of Infosys Limited, Larsen & Toubro Infotech Limited, Tata Elxsi Limited (seg), Persistent Systems Limited and Cybage Software Private Limited has come up for consideration and the Tribunal directed the exclusion of the same on the ground of non-comparability.

40.24 In the order dated 6-8-2019 in *Infor (India) (P.) Ltd.* v. *Dy. CIT* [2019] 109 taxmann.com 435 (Hyd. - Trib.) *vide* paragraph No. 76, the Co-ordinate Bench excluded Infosys Limited, Larsen & Toubro Infotech Limited and Mind Tree Ltd., in the light of the findings of the Hon'ble Delhi High Court in the case of *CIT* v. *Agnity India Technologies (P.) Ltd.* [2013] 36 taxmann.com 289/219 Taxman 26. *Vide* paragraph No. 77 of the same order, Tata Elxsi Limited (seg) and Persistent Systems were deleted while following the view taken in assessee's own case for the assessment year 2007-08. E-Infochips Ltd., is excluded on the ground of super normal profits because, on this ground itself, Infosys Limited, Larsen & Toubro Infotech Limited and Mindtree Ltd., were excluded.

40.25 In the assessment year 2015-16, by order dated 19/10/2020 in *Infor (India) (P.) Ltd.* v. *ACIT* ITA No. 1689/Hyd/2019, the Co-ordinate Bench excluded Infosys Limited, Larsen & Toubro Infotech Limited, Mindtree Ltd, Tata Elxsi Limited (seg), Persistent

Systems Limited, and Cybage Software Private Limited on the ground that such entities were considered to be un-fit for comparison with the assessee in assessee's own case for the assessment years 2013-14 and 2014-15 and there was no change in the factual matrix of the case.

40.26 A perusal of the orders in *Infor (India) (P.) Ltd.* case (*supra*), *Infor (India) (P.) Ltd.* case (*supra*) and *Infor (India) (P.) Ltd.'s* case (*supra*) therefore, makes it clear that all these seven comparables were found to be not comparable with the assessee consistently for the assessment years 2014-15, 2015-16 and 2016-17 on the ground of either functional dissimilarity or scales of turnover and profits or non-availability of segmental information, where it is necessary. All these entities are excluded from the list of comparables from the assessment years 2013-14 to 2016-17 consistently. Learned DR does not plead any change in the factual position for this assessment year from any of the earlier assessment years. Considering the similarly of the facts and circumstances, and respectfully following the consistent view taken by the Co-ordinate Benches in the assessee's own case, we direct the exclusion of Infosys Limited, Larsen & Toubro Infotech Limited, Tata Elxsi Limited (seg), Persistent Systems Limited, Mindtree Ltd, Cybage Software Private Limited and E-Info Chips Pvt. Ltd from the list of final comparables.

40.27 In view of the submission of the learned AR that with the exclusion of these seven entities from the list of comparables, the assessee would be within the range with the comparable companies

and any discussion in respect of other entities to be included/excluded would only be academic, we do not propose to deal with them. Suffice to direct the learned Assessing Officer/Ld. TPO to exclude the above entities, namely, Infosys Limited, Larsen & Toubro Infotech Limited, Tata Elxsi Limited (seg), Persistent Systems Limited, Mindtree Ltd, Cybage Software Private Limited and E-Info Chips Pvt. Ltd., from the list of comparables. Grounds No. 3 to 7 are allowed accordingly.

40.28 Respectfully following the above decision, the AO/TPO is directed to exclude this company.

Persistent Systems Ltd:

40.29 The ld. AR submitted that the Company has substantial RPT transaction for all 3 years (FY 16-17- 39.28%; FY 2015-16- 32.04% and FY 2014-15 -31.32%). The Company is functionally different as it is engaged in both rendering software services & developing software products. Segmental information pertaining to software development services is not available for all 3 years. The Company has incurred substantial R&D expenditure. The Company has undertaken business restructuring and acquisition in FY 2016-17. Reliance is placed on the following decisions:-

- M/s. Yahoo Software Development India Pvt. Ltd. vs JCIT, Special Range – 7, Bengaluru IT(TP)A No. 178/Bang/2022 for AY 2017-18
- ADP Pvt. Ltd., Hyderabad vs DCIT-1(1), Hyderabad for AY 2016-17 (TS-63-ITAT-2022 Hyd)

40.30 The ld. DR relied on the orders of lower authorities.

40.31 We have considered the rival submissions and perused the material on record. This company has been considered in assessee's own case for AY 2016-17 hereinabove. Since there is no change in functional profile of this company for the present year, in view of this, the AO/TPO is directed to follow the decision for AY 2016-17.

Tata Elxsi Ltd

40.32 The ld. AR submitted that the Company is functionally different as it is engaged in Embedded product design, Industrial design, Visual Computing Labs, Systems Integration. The Company has global brand image and has paid brand fees of Rs. 344.98 lakhs to Tata Sons Limited for AY 2017-18. There is vast difference between the profile of Tata Elxsi and the Appellant. Reliance is placed on the following decisions:-

- ADP Pvt. Ltd., Hyderabad vs DCIT-1(1), Hyderabad for AY 2016-17 (TS-63-ITAT-2022 Hyd)

40.33 The ld. DR relied on the orders of lower authorities.

40.34 We have considered the rival submissions and perused the material on record. The ld. DRP has discussed the issue in detail. We hold that his company is functionally dissimilar following the decision of the coordinate Bench of the ITAT Hyderabad in the case of Infor (India) Pvt. Ltd. [2022] 143 taxmann.com 68 (Hyderabad - Trib.) noted supra. The AO/TPO is directed to exclude this company.

41. By **ground No.5(v),** the assessee seeks inclusion of certain companies as comparables. In this regard, the orders of lower authorities and the submissions of the assessee are as follows:-

Companies	**Findings of lower authorities**	**Contentions of Appellant**
Akshay Software Technologies Limited	*TPO & DRP* 1.The company is functionally different as it is engaged in providing professional services, procurement, installation, implementation, support and maintenance of ERP products and services in India and Overseas (Pg 83-84 & 206 of Appeal Papers).	1.The company is functionally similar as it professional services, procurement, installation, implementation, support and maintenance of ERP products and services are in the nature of Software Development Services (relevant extract of website & submission at Pg 876-877 of PB I). 2.The company passes all filters applied by the TPO (submission at Pg 877-878 of PB I)
Athena Global Technologies Limited	*TPO* 1.This company does not appear in the search matrix of the TPO *DRP* 1.The company is functionally different as it is earning revenue from consulting income from software development.	1.The company is functionally similar as it is primarily engaged in software development (Submission at Pg 891-892 of PB I). 2. This company passes all filters applied by the TPO (Submission at Pg 892 of PB I). 3. The company has been included by the learned TPO in Appellant's own case for AY 2018-19 vide Order giving effect to directions u/s 144C dated 22.07.2022 and is attached as Annexure 2.
Evoke Technologies Private Limited	*TPO* 1.The company is	1.The company has single segment of Software

	functionally different as it is engaged in diversified activities and segmental data is not available. (Pg 206 of Appeal Papers. *DRP* 1.Unreliable data provided in annual report with regard to export revenue (Pg 84-85 of Appeal Papers)	Development Services and is therefore functionally similar (Submission at Pg 878-879 of PB I). 2.This company passes all filters applied by the TPO (Submission at Pg 879-880 of PB I and relevant extract of AR at Pg 1399, 1413-1415 of PB II). 3.The Appellant relies on the following decision: • *Quicklogic Software (India) Pvt. Ltd. vs DCIT, Circle-3(1)(1), Bengaluru (IT(TP)A No. 181/Bang/2022) for AY 2017-18* (Para 13.1 to 13.3 at Page 1370 of PB-II-Case law Compilation) • *ADP Pvt. Ltd., Hyderabad vs DCIT-1(1), Hyderabad (TS-63-ITAT-2022 Hyd) for AY 2016-17* (Para 12.4 of Pg 1288 of PB-II Case Law compilation).
E-Zest Solutions Limited	*TPO* 1.The company was rejected as it did not form part of search matrix (Pg 206 of Appeal Papers. *DRP* 1.Upheld the contention of the TPO (Pg 85 of Appeal Papers)	1.The company is listed in databases & financial data is available on public domain and databases for analysis. 2.The company is functionally similar as it provides solutions and services in product engineering and software development. (Submission at Pg 880-881 of PB I). 3. This company passes all filters applied by the TPO (Submission at Pg 882 of PB I).

Nitor Infotech Private Limited	*DRP* 1.This company does not appear in the search matrix of the TPO (Pg 90 of Appeal Papers).	1. The financial data relating to this company is available in public domain. 2.The company is functionally similar as it provides consultancy and technology services in the area of Business intelligence, collaboration, portals and performance management domain (Submission at Pg 894-895 of PB I). 3. This company passes all filters applied by the TPO (Submission at Pg 895 of PB I).
Sasken Communication Technologies Limited	*DRP* 1.The company is not comparable because it is engaged in diversified activities, has R&D activities and owns patents (Pg 90-91 of Appeal Papers)	1.The company is functionally similar as it is primarily engaged in software consulting and development. (submission at Pg 896 of PB I.) 2.The company passes all filters as applied by the TPO (submission at Pg 897-898 of PB I).

41.1 We have heard both the parties and perused the material on record regarding inclusion of above companies sought by the assessee and adjudicate the same as follows.

Akshay Software Technologies Limited

41.2 After hearing both the sides and perusing the entire material on record, we note that the ld. TPO has excluded this company by

observing that it is functionally different and PBDIT weighted average is calculated at -1.94%. However, the assessee has calculated margin of -3.55% and Cash PLI is -3.24%. The ld. AR of the assessee drew our attention to the company website information and submitted that the company passes all the filters applied by the TPO and it is functionally comparable. The ld. DRP has examined this issue in detail and it is held that the company is mainly engaged in providing professional services, procurement, installation, support and maintenance of ERP products in India and overseas. The observation of the DRP is as under:-

> "2.6.11.1 Having considered the submissions, and on perusal of the annual report we note that, as per information given at page 19 of the annual report, the company is engaged in providing Staffing services and SAP Business one services. It is seen from its P&L account, that it has reported revenue from operations of Rs.2557 lakhs which comprised revenue from services of Rs.2494 lakhs and sales of software licence of Rs.63 lakhs. As per Note 25 of annual report the revenue from export of software service was Rs.2003 lakhs and as per Note 24, the foreign branch expenditure was Rs.1956 lakhs. As per information in the notes forming financial information of the annual report revenue mainly represent income from professional services from Dubai.
>
> 2.6.11.2 System Application and Product in Data Processing is the short used for SAP. They are called as the developers for software that manages the business processes and customer relations. SAP provides software solutions to the businesses to automate their process of distribution and logistic indexes. These processes are combined to form a module and they interact with different business aspects. These are the tech-giants which makes enterprise resource planning (ERP) software. These provide organizations to support for logistics, financial, and distribution. It is used to integrate core business processes which are required for various functions concerning the SAP module. In this regard,

> it is relevant to note that ERP is a multi-layered software that integrates all the different functions within an organization. The ERP implementation requires professionals who have expertise in: -
>
> 1) Functional domain (i.e. domain knowledge of the business, its operations & management).
>
> 2) Software domain (i.e. technology expertise in software development)
>
> 2.6.11.3 Thus, ERP implementation & support involves personnel from professional domain and technology or software domain. Therefore, such services cannot be strictly said to be software services as non-software personnel may play a dominant role in the implementation. The very fact that this company has described that it had rendered professional services in Dubai, indicate that it pertained to the non-software services; or it is also possible it may be a mix of software services and professional services. As segmental information is not available for the same, we consider it appropriate to hold that this company is not functionally comparable to the assessee. Accordingly, the exclusion of this company is upheld."

We have considered the rival submissions and perused the material on record. This company has been considered in assessee's own case for AY 2016-17 at ground No.6.1 hereinabove and remitted to the AO/TPO for fresh consideration. Since there is no change in functional profile of this company for the present year, accordingly, the AO/TPO is directed to follow the decision for AY 2016-17."

41.3 We note that this Tribunal considered the inclusion of the companies viz., Athena Global Technologies Limited, Evoke Technologies Private Limited, E-Zest Solutions Limited, Nitor Infotech Private Limited, Sasken Communication Technologies Limited and Sankhya Infotech Ltd. in the case of *MetricStream Infotech (India) Pvt. Ltd. in IT(TP)A No.153/Bang/2022 for AY 2017-18 dated 16.06.2023* and it was held as under:-

22. "Evoke Technologies Private Limited

12. The TPO excluded this company for the reason that the company is functionally different. Before the DRP the assessee raised objection & the DRP upheld the same and observed that data provided in annual report with regard to export revenue is unreliable.

12.1 The ld. AR submitted that the company has single segment of Software Development Services and is therefore functionally similar. This company passes all filters applied by the TPO. He relied on the decision of Quicklogic Software (India) Pvt. Ltd. vs DCIT, Circle-3(1)(1), Bengaluru (IT(TP)A No. 181/Bang/2022) for AY 2017-18 to submit that this company has to be included in the comparables list.

12.2 The ld. DR relied on the orders of lower authorities.

12.3 We have heard the rival submissions and perused the material on record. In the case of Quicklogic Software (India) Pvt. Ltd. (supra), this Tribunal held as under:-

"13.1 It is submitted by Ld.AR that Batchmaster Software Pvt. Ltd. and DCIS DOT COM Solutions India Pvt. Ltd. was ignored by the Ld.TPO as it was reflecting in the search matrix carried out by him. Evoke Technologies Ltd. was rejected by the Ld.TPO for the reason that it supplies end to end services. The Ld.TPO also noted that it may be included in the services other than IT services.

13.2 It is thus submitted by the Ld.AR that in respect of the above three comparables, the Ld.TPO has not considered the functions performed and has cherry picked the comparables without going through the actual functions and annual reports. We are therefore directing these comparables to be reconsidered by the Ld.AO/TPO based on the annual reports.

13.3 The Ld.TPO shall consider these comparables after verifying the FAR of these comparables with that of assessee.

Accordingly, Batchmaster Software Pvt. Ltd., DCIS DOT COM Solutions India Pvt. Ltd. and Evoke Technologies Ltd. for denovo consideration to Ld.AO/TPO."

12.4 We further observed that the ld. DRP have observed that the figures are wrongly reported in the schedule NO. 2.29 & 2.16 & 2.26 in the financial statement in regard to the Export Turnover but this aspects were not discussed in the above said order as relied by the ld. AR, therefore this decision is not applicable. For the sake of convenience we are reproducing the findings of the ld. DRP as under:-

"Having considered the submissions, and on perusal of the annual report, we note that in the statutory auditor's report, it is stated in note 2.29 that the financial statements include branch revenue of Rs.1605 lakh and branch net-profit of Rs.2.19 lakh based on audited financial statement of the Branch outside India. Also, as per the geographic segmentation information, the revenue from India was given to be Rs.7214.60 lakhs and that the revenue from US was given to be Rs.160.9 lakh. Thus, the export revenue constitutes only 18.19% of the total revenue. Whereas the Note 2.16 shows export revenue of Rs.87.58 Crores as against total revenue of Rs.88.20 crores which is contradictory to the geographical segment information given at Note 2.26. Therefore, this company cannot be considered as comparable in view of unreliable data provided. In the annual report with regard to export revenue. In the absence of reliable information on export turnover it is not possible to ascertain whether the company satisfies export turnover filter adopted by the TPO. Hence the rejection of the company by TPO is upheld."

12.5 From the above observation of the ld. DRP we also note from financial statement that the ld. DRP have rightly observed that the figures are wrongly reported. Considering the above findings, in the absence of the correct reporting of the financial data by the comparable company, even if it satisfies the FAR & filters applied by the TPO, this company cannot be considered as comparable company.

23. Sasken Communication Technologies Limited

13. The TPO observed that the company is functionally different and fails export revenue filter. The DRP held that the company is not comparable because it is engaged in diversified activities, has R&D activities and owns patents.

13.1 The ld. AR submitted that the company is functionally similar as it is primarily engaged in software consulting and development. The company passes all filters including export revenue filter as applied by the TPO. He referred to pg. 1440, 1446-1450 of PB-II and submission at pg. 711 of PB-I. The DRP in Appellant's own case for AY 2018-19 has held Sasken to be functionally similar. Considering the arguments advanced from both the sides, we remit the issue to the AO/TPO for verification of the facts in AY 2018-19 and present year and for fresh decision in accordance with law.

24. Sankhya Infotech Limited

14. The TPO & DRP held that the company is functionally different as it is engaged in diversified activities and segmental data is not available. The ld. AR submitted that the company is functionally similar as it provides solutions and services in relation to software development and it passes all filters applied by the TPO. The ld. AR also referred to pg. 1452-1456 of PB-II and submission at pg. 707-708 of PB-I and also referred to pg.1469-1470 of PB-II and submission at pg. 708-709 of PB-I. Considering the arguments from both the sides and findings recorded by the lower authorities, we remit this issue to the AO/TPO for fresh consideration.

25. Athena Global Technologies Limited

15. The TPO & DRP rejected the company on the ground that it fails networth filter. The ld. DRP further noted that the negative net worth filter eliminates the intrinsically sick and non-performing companies owing to various internal reasons. The ld. AR submitted that the company is functionally similar as it is primarily engaged in software development. This company passes all filters applied by the TPO. He submitted that Companies having similar FAR cannot be excluded on the basis of negative net worth filter and relied on decision of Gillette

Diversified Operations Pvt Ltd [TS-218-ITAT-2016(DEL)-TP]. 151/DEL/2013 AY 2005-06, Order dated 01.04.2016

15.1 The ld. DR relied on the orders of lower authorities.

15.2 We have heard both the parties and perused the material on record. We notice from the financial statement that the net worth of the company has been eroded and it is negative net worth company. During the FY 31.3.2016 the negative net worth was Rs. 10.31 crores and in the current year Rs.11.91 crores. Resultantly, the negative net worth is increased by Rs.1.60 crores. However, the revenue from operations has been increased by Rs.2.07 crores, The total net profit before adjusting exceptional item is Rs.0.16 crores and profit from operations before adjusting exceptional item and taxes was decreased by Rs.0.12 crores. On observation of the financial statement, the negative net worth of the company has increased. Further on perusal of the Note No.18 revenue from operations, the company has shown consulting income of Rs.10.58 crores and as per Note No.36, which is placed at Pg. 1490 of PB, states as under:-

"The company's operations primarily relate to providing information technology (IT services). Accordingly, the company operates in a single segment which represents the primary segment. Secondly, segmental reporting is performed on the basis of geographical location of the customers as under:-

US	Rs.8.20 crores
UK	Rs.0.63 crores
India	Rs.1.62 crores
Norway	Rs.0.13 crores
Total	Rs.10.58 crores

15.3 Since the lower authorities have rejected this company only on the basis of negative net worth, which leads to intrinsically sick and non-performing companies, but FAR analysis has not been done by both the parties. If the company passes FAR applied by the ld. TPO, the company cannot be excluded only because of the negative net worth. This view is supported in the judgment relied by the AR in the case of Gillette Diversified Operations Pvt Ltd (supra) in which it has been held as under:-

24. Ld. TPO rejected two comparables which are discussed as under:-

a. Argus Cosmetic Ltd.

.....

b. Muller & Phipps India Ltd.

i. The ld TPO has excluded this comparable stating that it has a negative net worth for the year 2005 hence it is not fit comparable to be taken. On appeal before the ld CIT(A) the assessee submitted that the TP regulation and OECD guidelines do not suggest that loss making company should not be taken as comparable. The ld CIT (A) has hold that this company is not simply the loss making company but is also a company having negative net worth and according to him when a company suffers from erosion of its wealth because of continuous loss, same cannot be taken as comparable. The case laws relied upon by the appellant were also rejected as according to him those were relied upon high loss making company and not for a negative net worth comparables.

ii. Before us the ld AR submitted that merely because a company is having negative net worth it cannot be excluded as comparable if the functions performed, Assets deployed and risk assumed are comparable with the business of the company. Against this the ld AR relied on the order of the lower authorities

25. We have carefully considered the rival contentions. According to rule 10(B)(a) of the Income Tax Rules the comparability of international transactions with an uncontrolled transaction shall be judged with respect to the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions. According to the Rule 10B(3) a uncontrolled transaction shall be comparable to an international transaction none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market. We do not find any such exception provided

under the Income Tax Rules 1962. Furthermore neither the ld CIT(A) nor the ld AO had pointed out that how the negative net worth of the comparable make the price of the goods or the profitability arising from such transaction not comparable. Merely because the company is having negative net worth but when the FAR is comparable, it cannot be said to be non comparable unless it is shown that how the negative net worth of the company has impacted the profitability of the comparable company. We have also noted the issue decided by Special bench in the case of DCIT V Quark Systems Limited in 2010-TII-02-ITAT-CHD-SB-TP where in the negative net worth company was considered and it was held that business organization with negative net worth cannot be treated at par with a normal business organization. However while considering that issue the comparable was also functionally not comparable in that case. Therefore there was no view expressed in that decision that though comparable has similar FAR still negative net worth company is required to be excluded without showing the impact of negative net worth on the profitability of the company. In view of this we direct the inclusion of this Company i.e. Muller & Phipp India Limited as comparable for the purpose of determining arms length price.

15.4 Accordingly, we remit this issue to the AO/TPO for fresh consideration as per above directions.

26. E-Zest Solutions Limited

16. The TPO & DRP excluded this company on the ground of functionality as it is engaged in ITeS. The ld. AR submitted that it is functionally similar as it provides software development services and passes all filters applied by the TPO.

16.1 The ld. DR relied on the orders of lower authorities.

16.2 We have heard both the parties and perused the material on record. On going through the order of the lower authorities they have excluded this company by holding that the company is engaged in ITeS. We note that in the case of Global E- Business Operations (P.) Ltd. v. Deputy Commissioner of Income Tax in IT (TP) A No. 174/BANG/2022 order dated 16.11.2022 reported

in [2023] 147 taxmann.com174 (Bangalore- Trib) for AY 2017-18 it has been held that the company is engaged in ITeS. The relevant part of the order is as under:-

13.1 At the time of hearing, the ld. A.R. pressed only following 4 comparables for inclusion:

a. Bhilwara Infotechnology Limited;
b. R Systems International Limited;
c. ISN Global Solutions Private Limited; and
d. E-ZestSolutions Limited;

13.2 The other comparables are not pressed. Accordingly, dismissed as not pressed.

Bhilwara Infotechnology Limited & R Systems International Limited:

13.3 ……

13.4 ……

ISN Global Limited:

13.5 ……

13.6 ……

13.7 …….

E-ZestSolutions Limited:

13.8 Now coming to E-ZestSolutions Limited, the ld. DRP observed that on perusal of the annual report it was noted that the company has income from sale of services amounting to Rs. 81.46 crores as per the information statement of profit and loss account given at page nos. 123-125 of the annual report. The company reported that it is exclusively engaged in the business of IT enabled services. This is the context of on segment reporting and is considered to constitute a single primary segment. As it is part of search matrix of the TPO and functionally similar to the assessee, the TPO is directed to include the comparable for the

comparability analysis under ITES segment if it satisfies the filters adopted by the TPO.

13.9 However, the AO/TPO has not included E-ZestSolutions Ltd. in the list of comparables while determining the ALP. However, we direct the AO/TPO to pass the above order in conformity with the order of the Ld. DRP as recorded in para 13.8 above. This ground of appeal of the assessee is allowed.

16.3 In the present case the assessee is engaged in the business of software development services whereas E-Zest Solutions Ltd. is ITeS company. The software development service business company cannot be compared with the ITeS company. Respectfully following the above judgment, we reject the contention of the assessee and uphold the orders of lower authorities.

27. Nitor Infotech Private Limited

18. This company was rejected since it did not appear in the search matrix of the TPO. The ld. AR submitted that the financial data relating to this company is available in public domain. It is functionally similar as it provides consultancy and technology services in the area of Business intelligence, collaboration, portals and performance management domain and passes all filters applied by the TPO.

18.1 The ld. DR relied on the orders of lower authorities.

18.2 We have heard both the parties and perused the material on record. During the course of hearing, the ld. AR submitted that the data is available in public domain and it is functionally comparable, but during the course of search process by the ld. TPO, it was not appearing in the search process. The ld. AR of the assessee has filed paperbook in which the financial statement of this company is placed at page No.1561 to 1575. We remit this issue to the AO/TPO for examination whether this company passes the FAR and decide the issue afresh as per law."

41.4 Following the above decision of the Tribunal, we direct the AO/TPO to decide the issue with respect to inclusion of above

companies in the light of the aforesaid decision in the case of *Metric Stream Infotech Pvt. Ltd. (supra).*

42. The **grounds No.8(i) & (ii)** regarding Cash PLI and risk adjustment is covered by our decision in ground No.11(i) & (ii) for AY 2016-17. Therefore the same decision applies for AY 2017-18 also.

43. **Ground No.9** regarding notional interest on trade receivables is covered by our decision in ground No.18 for AY 2016-17. Therefore the same decision applies for AY 2017-18 also.

44. **Ground No.10** relates to depreciation on goodwill disallowed by the AO and confirmed by the DRP. This issue has been considered in ground No.19 for the AY 2016-17 hereinabove and remitted back to the AO for fresh decision as per law. The assessee has claimed deprecation on goodwill at WDV for this AY 2017-18. Since this is the second year of claim of depreciation on goodwill after amalgamation, this issue is also remitted back to the AO for fresh consideration in accordance with law in line with our decision for AY 2016-17.

45. **Ground No.11** is consequential in nature.

46. In the result, both the appeals of the assessee are partly allowed for statistical purpose.

47. In view of the disposal of the appeals, the stay petitions for both the years have become infructuous and dismissed accordingly.

Pronounced in the open court on this 26th day of June, 2023.

Sd/-	Sd/-
(BEENA PILLAI)	(LAXMI PRASAD SAHU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 26th June, 2023.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.